IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. E. WENIGER and CHARLES BLOOM,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 6168

BRIEF OF APPELLANTS.

On Appeal from the District Court of the United States for the District of Idaho. Northern Division.

TURNER, NUZUM & NUZUM,
Spokane, Washington,
O. J. BANDELIN,
Sandpoint, Idaho,
Counsel for Appellants.

THE FRANKLIN PRESS, SPOKANE

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STATEMENT

This prosecution was founded on an official act of the council of the village of Mullan, in the county of Idaho, one of the legislative and administrative agencies of Idaho.

Mullan is a town of about three thousand people, adjacent to the great Morning Mine, which employs about one thousand miners. The miners and their families constitute the town of Mullan. The council of the village appears to have exercised both legislative and administrative functions.

In February, 1924, being in debt about eight thousand dollars, and needing money for adequate policing and for streets, bridges and other municipal purposes, the village of Mullan, by and through its councilmen, passed a licensing ordinance, No. 105, prescribing the businesses subject to license, and the amount to be paid by each licensee. (Bill of Exceptions pp. 307 to 317, both inclusive). The businesses to be licensed and the rate of the licenses were as follows: Billiard rooms, pool halls or bowling alleys, $3.00 a quarter, and for each billiard table, pool table or alley, $1.00 per quarter; Soft drink parlors were to pay $25.00 per month; Soda or ice cream stands $1.00 per year; Theaters or picture houses, $15.00 per quarter; Min-

strels, legerdemain, carnivals or conducting any fortune-telling or business not otherwise provided for, $5.00 for each single performance; for any circus or menagerie, including sideshows, $50.00 per day; for conducting variety or concert theaters, $15.00 per day; for merry-go-rounds, $25.00 per day; for shooting galleries, or doll racks or cane racks, $5.00 per day or $25.00 per quarter; public garage, $16.00 per year, public merchant, hawker or peddler who carries a pack, $5.00 per day, if traveling on foot; conducting a gas or electric plant, $10.00 per quarter; conducting water works or plumbing store, or both, $10.00 per quarter; conducting telephone business, $5.00 per quarter; conducting motor bus or car for hire, $3.00 per quarter; conducting hotel or lodging house, restaurant or public eating place, $3.00 per quarter; conducting laundry business, $3.00 per quarter; conducting roller or skating rink, $10.00 per month; for selling goods, wares and merchandise, drugs or medicines, jewelry or wares of precious metals, etc., $1.50 per quarter. Then followed penal provisions to enforce payment of licenses, as provided to be paid by the licensees.

The passage of this ordinance was one of the overt acts laid in the indictment.

This ordinance not producing sufficient funds for the needs of the village, an appeal was made later to the public to contribute money for that purpose, which appeal was couched in the following language:

"Mullan, Idaho, May 1, 1927.

TO WHOM IT MAY CONCERN:

WHEREAS, The assessed valuation of the village of Mullan, County of Shoshone, Idaho, is $400,123.00, and a levy of Fifteen (15) Mills, which is the maximum levy permitted by law to be made by the Trustees of said village for general revenue purposes, will produce approximately but $6000.00; and,

WHEREAS, It requires considerably more than that sum to conduct said Village Government and maintain the Streets, Bridges and Sewers therein;

THEREFORE, The undersigned residents of said Village of Mullan, in order to assist in the maintenance of said Village government hereby Voluntarily contribute to the General Fund of said Village, the sums set opposite their respective names:"

These printed appeals were taken by the chief of police and citizens and people engaged in the various businesses contributed. A similar appeal was made for each month thereafter until October, 1928, when such appeals were discontinued, (Trans. pp. 199 to 232, both inclusive).

The practice prevailed in the village of the chief

of police collecting under the licenses and under the appeals until no very clear line of demarcation existed, the chief collecting under the license ordinance or under the appeal indiscriminately, and turning the money over to the city when collected. Under one or the other method, monies were collected from legitimate businesses as well as from gambling houses, houses of prostitution and from the illicit sale of intoxicating liquor.

All the individuals who sold intoxicating liquor in Mullan, the councilmen and other officials of the village of Mullan, and the sheriff of the county and his deputy, Bloom, were united in the indictment for conspiracy, and all were convicted. All the principal officials except the plaintiffs in error, Sheriff Weniger and Deputy Bloom, accepted the sentence imposed on them, and are now in the penitentiary at McNeil Island serving out their sentences.

There was no evidence to indicate, indeed the contrary was admitted by the government, that any of the members of the village council, or any of its under officials, including the police, or the sheriff or his deputy, Bloom, profited in any manner, shape or form from the practice pursued in carrying out the license ordinance.

There was no evidence that the village of Mullan or any of its officials promised immunity to any of the persons paying license and engaged in the liquor business, or that the latter were offered protection from arrest or punishment under the laws of the United States, or even under the laws of the State of Idaho. If immunity from prosecution under the laws of the state might be implied from the course of conduct pursued, it could not be implied as to immunity from arrest and punishment under the laws of the United States. There is no testimony of any character indicating the latter to have been the fact.

There was no evidence that any of the wretched creatures engaged in gambling, prostitution or in the selling of liquor in the village knew or that they were in fact engaged in a common conspiracy with the other defendants to violate the laws of the United States. Each knew that he or she was licensed to conduct some innocent business, such as a lodging house or soft drink parlor or hotel, or some other occupation, and that the license was a prerequisite to the carrying on of their illicit business. So far as they were concerned, there was no concert of action. Each man or woman was acting for himself or herself alone. There was, we believe, an entire absence of testimony showing "a serious and substantially

continued group scheme for cooperative law breaking." Yet they were all convicted, as always happens when a large number of persons are united in one indictment for conspiracy, all being under the finger of suspicion, and the very lightest implication being taken as sufficient to involve them in the conspiracy charged. This is especially true where the trial judge does not, by proper instructions, make plain to the jury their duty in the premises. This was not done in this case, except in a superficial manner, and special instructions asked on the subject were denied by the court.

As to the plaintiffs in error here, Sheriff Weniger and Deputy Bloom, there is no evidence worthy the name that they were parties to the conspiracy charged. This statement we will substantiate in the body of our brief.

The case was hurriedly tried by Judge Webster, probably because of the large number of defendants and the very considerable time necessarily to be taken in conducting the trial, and also probably because his honor, Judge Webster, had tried a number of such cases and was very familiar with the law. Objections to testimony, except in one or two instances, were decided offhand and without hearing from counsel. Even the motions to discharge the defendants, Weniger and Bloom, after the governments' testimony

was concluded, and for a directed verdict at the end of all the testimony, were denied without argument, although the opportunity to present argument was requested. This manner of conducting a case was almost equivalent, if not entirely so, to a denial of the right to be heard. Its influence on the jury was devastating. Counsel for defendants were discredited, and the atmosphere of the courtroom was so dense in favor of conviction that the efforts of counsel to present the salient features of the case and impress on the minds of the jury the cardinal rules relating to prosecutions for conspiracy, were futile and of no avail.

While we have felt it our duty to make these observations concerning the trial, we have the very highest respect for Judge Webster as an able and impartial judge. Judge Webster was familiar with the case of *Allen et al. v. United States,* 4 Fed. (2nd Series) 688, a case having many of the features of this case, and he had applied that case in a number of conspiracy cases tried by him. He felt that he did not need the assistance of counsel in his rulings. He undoubtedly failed to consider the sinister effect of that manner of conducting the case on the rights of the defendants being prosecuted.

We do not have the respect for the Allen case

that Judge Webster has, and would have liked to have presented some considerations bearing on the guilt or innocence of the defendants, which the judge considered foreclosed by that case. We would have liked the opportunity to discuss that case in its bearings on the case being tried, but having been denied the opportunity below, we will take the opportunity to do so in this court, in its proper place.

We will now proceed to the specific errors assigned.

ARGUMENT

We desire in the beginning to present an objection to this prosecution, which, if valid, is fatal to its maintenance. All the testimony in the case goes back to the passage of the ordinance No. 105, by the council of the village of Mullan. That ordinance will be found on pages 307 to 317 of the Transcript. The entire testimony revolved around that official act. It relates to the different persons accepting the benefit of said ordinance, paying the rates therein fixed, and doing an illicit liquor business thereunder, mixed up indiscriminately with testimony of payments for running gambling houses and houses of prostitution. It would be a work of superogation to cite the pages of the testimony. It runs through the entire case. The testimony against the plaintiffs in error herein was

directed to connecting them with that conspiracy.

We understand that we are entitled to except to the jurisdiction of the court to entertain such prosecution at any time and in any court. See *Linder v. United States,* 268 U. S. 5; 69 L. Ed. 819, where the Supreme Court granted certiorari to this court and reversed the judgment of this court on jurisdictional grounds, although no objection had been taken to the jurisdiction below, either in this court or in the District Court.

However, we believe the specification of error 145 and 146 Transcript pages 129-130, sufficient to cover the proposition we are now advancing. Also Assignment of Error No. 20, which relates specifically to the objection to the introduction of the evidence in question on the grounds which we are now urging. (Trans. p. 77).

Our contention is that the United States cannot found a criminal prosecution in whole or in part on an official act of a state, or any instrumentality of a state, and that where that is attempted the federal court in which such prosecution is brought is without jurisdiction to proceed.

The government of the United States and the

governments of the several states are each supreme within the limits of their respective powers, but where their powers come into conflict, those of the general government must prevail. But powers belonging to the states cannot be controlled by criminal prosecution even in aid of some federal power. The United States cannot affirmatively control the executive or legislative branch of the state government, or interfere with the administration of the function of the state government through its inferior instrumentalities. It may inquire into the acts of such inferior instrumentalities or into the validity of legislative or executive acts and pronounce on their validity, when they are alleged to come in conflict with federal, statutory or constitutional provisions, in a case made between private parties and properly brought in a federal court, or by error to a state court where such questions are decided in such court. This results from the superiority of the federal constitution, and is permissible because it does not directly impeach or interfere with the administrative functions of the state.

But it cannot undertake to regulate or control or to impeach the officers of the state, legislative, executive or judicial, in the performance of their duties, so as to make them liable to the criminal laws of

the United States, for action or inaction within the scope of their duties.

This question arose early in the history of the nation, in relation to the attempts of the states to tax instrumentalities of the national government. That power was denied in *McCulloch v. Maryland,* 4th Wheaten, 316; *Weston v. Charleston,* 2nd Peters, 449; *Osborne v. Bank of the United States,* 9th Wheaten, 738, in all of which cases the attempt was made by states to tax securities issued by the United States, or to tax the Bank of the United States chartered by congress.

Such action on the part of the states was declared invalid because it constituted an interference with the instrumentalities of the national government. We do not quote from these cases because later cases in which the same principles were declared are more clearly apposite.

In the case of *Collector v. Day,* 11 Wallace, 113, the same principle was applied in favor of the states in a case in which the government of the United States undertook to tax salaries of judicial officers of the state. Mr. Justice Nelson, in the majority opinion handed down, thus states the doctrine laid down in that and former cases, and which has been followed

ever since where attempts of either sovereignty have been made to tamper with or interfere with the governmental instrumentalities of the other.

> "It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or, to the people.' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.
>
> The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States.
>
> Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and

protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might * * *.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the

laws, and which concerns the exercise of a right reserved to the States? * * *

And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

Chief Justice Chase, in *Lane County v. Oregon,* 7th Wallace, 71, thus states the nature of the relation between the states and the nation:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could

be no such political body as the United States. Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: 'The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes.' "

Another case to which we call attention is the *Tarbles case*, 13 Wallace 397. In that case the courts of the State of Wisconsin had undertaken, under the process of habeas corpus, to release from the custody of a recruiting officer an enlisted soldier on the ground that he was a minor under the age of eighteen years. Writ of error to the Supreme Court of Wisconsin issued, and the judgment of the State court releasing the enlisted soldier was reversed. In the course of the opinion by Mr. Justice Field, the rela-

tion between the national government and the respective state governments was thus described:

> "It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several states that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, 'anything in the constitution or laws of any State to the contrary notwithstanding.' Whenever, therefore, any conflict arises between the enactment of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the National tribunals, and the ultimate determina-

tion of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. 'The Constitution,' as said by Mr. Chief Justice Taney, 'was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities.' And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

This case followed shortly after that of *Ableman v. Booth, 27* Howard, p. 506, a case arising out of the fact that courts of Wisconsin had undertaken to release on habeas corpus a fugitive slave in the custody of the United States Marshal under the fugitive slave law of the United States. The judgment of the Supreme Court of the state was reversed (Opinion by C. J. Taney) on the same doctrine laid down by Mr. Justice Field in the Tarble case. It is an interesting case and well worth reading, especially in the light of the history of that time, in which the people of the northern states and the judiciary of one of the northern states had set their faces against the enforcement of a law of the United States which they felt transgressed against the law of God, although it might be sufficiently authenticated as the law of man. We do not quote from it, because the doctrine of the relation between the state and federal govrnments is more perspicuously laid down by Judge Field in the Tarble case.

We come now to the later cases:

Boyd v. Thaper, 143 U. S. 182.

This case was a contested election for the office of governor, brought in the state courts of Nebraska, and reaching the Supreme Court of the United States

by writ of error. The Supreme Court held that it had jurisdiction to review the case because of a federal question presented, namely whether Boyd, the elected governor, had been properly naturalized as a citizen of the United States. Mr. Justice Field dissented, and among other things said:

> "I dissent from the judgment just rendered. I do not think that this court has any jurisdiction to determine a disputed question as to the right to the governorship of a State, however that question may be decided by its authorities. I agree that the States of the American Union are not in all respects independent political communities; I agree that they do not possess that supreme political authority which would entitle them to be called sovereign States in the full sense of those terms, as they are often designated. They are qualified sovereignties possessing only the powers of an independent political organization which are not ceded to the general government or prohibited to them by the Constitution. But, except as such powers are ceded to the general government or prohibited to them, the States are independent political communities. This is not a matter of argument or inference, but is the express declaration of the Tenth Amendment. As forcibly stated by Mr. Justice Nelson, speaking for this Court, 'the general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that gov-

ernment within its sphere is independent of the States.' The *Collector v. Day,* 11 Wall, 113, 124. In no respect is this independence of the States more marked, or more essential to their peace and tranquility than in their absolute power to prescribe the qualifications of all their state officers, from their chief magistrate to the lowest official employed in the administration of their local government; to determine the manner of their election, whether by open or secret ballot, and whether by local bodies or by general suffrage; the tenure by which they shall hold their respective offices; the grounds on which their election may be contested, the tribunals before which such contest shall be made, the manner in which it shall be conducted; and the effect to be given to the decision rendered. With none of these things can the government of the United States interfere. In all these particulars the States, to use the language of Mr. Justice Nelson, are as independent of the general government as that government within its sphere is independent of the States. Its power of interference with the administration of the affairs of the State and the officers through whom they are conducted extends only so far as may be necessary to secure to it a republican form of government, and protect it against invasion, and also against domestic violence on the application of its legislature, or of its executive when that body cannot be convened. Const. Art. IV, Sec. 4. Except as required for these purposes, it can no more interfere with the qualifications, election and installation of the state officers, than a foreign government. And all attempts at interference with them in those respects by the executive, legislative or judicial departments of the general government are in my judgment so many invasions upon the reserved rights of the States and assaults upon their constitutional autonomy."

While the opinion from which we quote is a dissenting opinion, the doctrine that it lays down was not at all questioned by the majority, the opinion of the latter proceeding on the technical doctrine that a law of the United States was called in question and that that gave the Supreme Court jurisdiction on writ of error.

The subsequent case of *Taylor and Marshall v. Beckham*, 178 U. S. 548, explains the ground on which the decision in *Boyd v. Thayer* proceeded, and again states the general doctrine of the inviolability of the state and its officials in all matters not committed to the general government by the federal constitution.

> "The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question * * *. In its internal administration the State (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court * * *. Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been

violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws."

It was said by Mr. Justice Field in the Tarble case:

"Such being the independent and distinct character of the two governments within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy."

So far as the cases indicate, that power of intrusion on the part of the national government has never been exercised except by the revisory power of the Supreme Court through error to the inferior federal courts or error to or appeal from the supreme courts of the several states. It would be subsersive of all harmonious action between the two sovereignties if either could enforce its rightful supremacy against the other by criminal proceeding. If the national government may go to that extent to enforce its supremacy, then there is no limit to the state instrumentalities which it may so pursue. The governor and legislature of a state may be indicted for conspiracy to violate the Volstead Act by the passage of an act by the legislature and governor which repeals all liquor enforcement provisions, and provides for a licensing act, innocent on its face, under which illicit sales of liquor are made.

That, of course, would be an extreme case, but if the power to enforce the 18th Amendment and the Volstead Act by criminal prosecution against any instrumentality of the state, however modest in character, be sustained, then the same method of enforcing the 18th Amendment and the Volstead Act must be open to the government as to any instrumentality of the state, however high its character.

Conversely, if it be thought that a village council is an instrumentality too insignificant to be entitled to the protection of the principal in question, it should be remembered that the federal instrumentality interfered with in *Ableman v. Booth*, was a marshal of the United States. That interfered with in Tarbles case was a recruiting sergeant of the United States Army.

Quite a number of states have already repealed their enforcement acts and thereby declined to aid the government in the enforcement of the Volstead Act, and have no doubt thereby much impaired the ability of the nation to enforce the Act. The governor and members of the legislature of those states would be guilty of conspiracy, under the theory on which Judge Webster tried this case, namely that such officials are guilty of conspiracy to violate the Volstead Act if they do no more than refuse to make and en-

force state laws on the subject. Governor Smith of New York and the member of the legislature of that state under that theory would all be in the penitentiary now, if the nation had enforced against them its power to maintain the supremacy of the Volstead Act by criminal proceedings. Much more does not need to be said on this particular phase of the question.

There is one other phase to which we must advert before closing this discussion. It appears that collections were made by the chief of police under both the licensing ordinance and under appeal to the public for subscriptions. Nothing definite was shown on the subject. It is a fact which must be accepted as clearly established that some, and probably most, of the collections made were for licenses issued by the clerk of the village. (See testimony of Clerk of the village of Mullan, Trans. pp. 345-346.) We respectfully submit that if any of the collections were made under the licensing ordinance and those collections were relied on by the government in the prosecutions below, then, in view of the difficulty of segregating the collections and assigning to each kind of collection the influence it may have had on the jury in reaching its verdict, it was at least a clear reversible error to receive evidence of collections under the ordinance. The ordinance was passed on the 4th day of February, 1924

(Trans. p. 317). The first appeal to the public was made some time thereafter. Thus there was a period during which all collections must have been made under the ordinance. The latter is set out in the indictment as one of the overt acts. The conspiracy must then have been in existence, and who can say what the influence of the action of the council of the village during that period was on the verdict of the jury? And lastly the collections under the appeal, as well as under the ordinance, were reported to the council of the village in official session each month by the collecting official, and received by the council.

> "I collected from the different ones. Some objected to paying the full amount, that their business did not justify it, and I took any amount of money what was offered, and I turned that money into Mr. Martin, the Village Clerk. He made a copy of the names and amounts at the end of each month, and summed it up together, and gave a copy to each of the trustees at the first meeting of the next month, so they had a list of every name I collected from except a few marked cash."

(Testimony of Chief of Police Needham, Trans. p. 193).

> "I never discussed what the purpose of collecting the money was. I never discussed selling liquor."

(Tes. Needham, Trans. p. 242.)

> "With reference to the licenses, the clerk issued

them once a month and placed in my hands to collect. As to donations collected, the clerk had no record of them until I turned them in to him."

(Trans. p. 238.)

If it may be thought that the reception of the money paid in response to the appeal to the public generally would be sufficient to constitute a conspiracy inocuous to the objection we are now making, then certainly the reception of the ordinance was clear error. The reception of that ordinance in evidence was objected to on the specific ground here being advanced.

(Assignment of Error No. 20, Trans. p. 77.)

Assignments of Error Numbers 5, 6, 7, 8, 9, 106, 107, 109, 110, 111, 112, 125, 126, 130, 133, 134, 135 and 136.

These assignments all relate to the testimony permitted to be introduced over defendants' objection and exception, relating to collections under the appeal or under the license ordinance from persons engaged in gambling and in conducting houses of prostitution. Twenty-two of these written appeals, and the names of persons subscribing thereto, were introduced in evidence (Trans. pp. 198 to 232, both inclusive), and the occupation of person subscribing, whether doing a legitimate business, or whether engaged in liquor

selling, or in gambling, or in prostitution, was brought out by the district attorney in extenso. That line of testimony was permitted throughout the entire case and in the cross examination of the defendant, Bloom, the last witness for the defense, it was pursued to the extreme.

We assume that it is not necessary to cite authorities to the proposition that testimony as to gambling and prostitution was incompetent, irrelevant and immaterial, and that it was highly prejudicial. The only matter necessary to be discussed is whether his honor, Judge Webster, gave any valid reason for his rulings in his instructions to the jury as follows:

> "The testimony in this case with respect to gambling and prostitution in the village of Mullan was admitted because it was so interwoven with the charge of violating the laws of the United States, namely the prohibition laws, that it was competent for you to take it into consideration in connection with all the other facts and circumstances disclosed by the evidence in the case as a shedding light on the question of whether there was a conspiracy to violate the prohibition laws, if in your judgment such evidence has any such effect."

Gambling and prostitution were not interwoven with the charge of violating the laws of the United States made in the indictment. Neither were mentioned in the indictment. Neither ever need have been heard of by

the jury but for the affirmative act of the district attorney in dinning, gambling and prostitution into the ears of the jury with the permission of the court. It was perfectly feasible for the government to have made its case on a conspiracy to violate the Volstead Act, without ever mentioning gambling or prostitution. That feature was foisted into the case for its prejudicial effect on the jury.

Did such testimony shed any light on the question of whether there was a conspiracy to violate the prohibition laws, as suggested by the court in its charge to the jury? We say not.

The judge further enlarged the effect of the testimoney as to gambling and prostitution by saying to the jury:

> "If in your judgment any such evidence has any such effect,"

We submit that it was the duty of the judge, and not of the jury, to determine what the effect of such testimony was, and when he submitted the testimony to the jury on the untenable theory that it was so interwoven with the conspiracy to violate the liquor laws that it could not be separated, and then permitted the jury to determine whether it should have any effect on their verdict, the maximum of injury

from the reception of incompetent and prejudicial testimony was inflicted.

That the purpose of the testimony was intended to prejudice the defendants was made manifest in the cross examination of the plaintiff in error, Bloom, by the district attorney. The defendant Bloom had testified in response to the questions of the district attorney that "there were pool tables in the middle room of the Bilberg," and that he saw card playing, but did not know what game they were playing. We now give the balance of the cross examination on the subject of gambling:

> "Q. What were they playing?
> A. Well, I don't know that.
> MR. NUZUM: Wait a minute, Bloom. I object as incompetent, irrelevant and immaterial as to any card-playing in the Bilberg.'
> THE COURT: Objection overruled.
> MR. NUZUM: Exception.
> A. I did not stop long enough to find out what game they were playing.
> Q. You did not want to know, did you?
> MR. NUZUM: Just a moment, I object, your Honor please, as improper cross examination.
> THE COURT: The objection is overruled.
> MR. NUZUM: Exception.
> A. Well, I didn't say that I did not want to know. I did not really think about what they were playing or not.
> MR. LANGROISE: Q. Weren't you interested as an officer of the law?
> MR. NUZUM: I object as immaterial and in-

competent.

THE COURT: Overruled.

A. Interested, yes, I suppose I was interested.

MR. LANGROISE: Q. You had taken an oath to enforce the laws of this county, had you not?

A. Yes sir.

Q. And there is a law against gambling, isn't there?

MR. NUZUM: I object as incompetent and immaterial, anything about gambling.

THE COURT: The objection is overruled.

MR. NUZUM: Exception.

A. Well, I don't know whether it was gambling or not.

MR. LANGROISE: Q. You did not try to find out either, did you, Mr. Bloom?

MR. NUZUM: I object as incompetent and immaterial.

THE COURT: The objection is overruled.

A. I saw the cards and the chips on the tables and they were playing.

MR. LANGROISE: Q. And you did not try to find out, did you, what they were playing?

MR. NUZUM: The same objection.

THE COURT: Overruled.

A. I don't know that I did.

MR. LANGROISE: Q. You had never heard any reports that they were gambling at the Bilberg, did you?

MR. NUZUM: I object as incompetent and immaterial.

THE COURT: Overruled.

MR. NUZUM: Exception.

A. I heard they were playing cards there.

MR. LANGROISE: Q. Did you have any information or any reports come to you that they were gambling?

A. No.

Q. Never during all the time that you lived in Mullan?

A. No complaint, no.

Q. And you never heard any rumor that they were gambling at the Bilberg?

MR. NUZUM: I object as incompetent and immaterial.

THE COURT: Overruled.

MR. NUZUM: Exception.

A. I heard they were playing cards, that is all. I don't know whether it was gambling or not. By playing cards I mean people sit down around the table and play a game of cards of any kind.

Q. What did you hear about it?

MR. NUZUM: I object as immaterial.

THE COURT: Overruled.

MR. NUZUM: Exception.

* * *

Q. You never heard of any gambling going on up in the Central Hotel Bar?

A. No sir.

MR. NUZUM: I object to that as immaterial and irrelevant.

THE COURT: Overruled.

A. Did you ever make any inquiry as to whether or not there was any gambling going on?

MR. NUZUM: I object to that as immaterial, whether he made any inquiry or not.

THE COURT: Overruled.

* * *

Q. Did you ask them whether or not there was any gambling in there?

MR. NUZUM: I object to that as immaterial, whether or not there was any gambling.

THE COURT: Overruled.

A. I didn't.

Q. Were you interested in whether or not there was any gambling there?

A. I was.

MR. NUZUM: I object to that as immaterial.
THE COURT: Overruled.
Q. Why didn't you ask about it then?
MR. NUZUM: I object to that as immaterial.
THE COURT: Overruled."

Further comment on the action of the court is not necessary. It may be said that the exceptions taken to the reception of this testimony was by counsel other than counsel for the present plaintiffs in error. That, however, is not true as to the exception taken on the cross examination of Deputy Bloom. Moreover, early in the case, because of the multiplicity of counsel, the court, on request of Mr. Nuzum for an exception on behalf of Bloom and Weniger to the ruling of the court, made this pronouncement:

"MR. NUZUM: May we have an exception?
THE COURT: Yes sir. I think it may be understood now so far as this court is concerned, that each counsel may consider it understood that the exception is reserved and allowed to all adverse rulings."

Assignments of Error No. 13, 14, 15 and 16.

These assignments relate to the testimony of the witness, McGill, to the effect that the defendant, Bloom, was at Mullan on election day, 1928, and that the witness put at his disposal an automobile to be used in that election.

The idea of the district attorney no doubt was that such testimony would tend to show an attempt to control the election by the defendants, Bloom and Weniger, in aid of the alleged conspiracy.

We insert the testimony admitted:

"Q. What, if anything did you do concerning the election on that day, Mr. McGill?

MR. NUZUM: I object as incompetent, irrelevant and immaterial.

MR. RAY: I think I shall bring it out directly as touching the officials of Shoshone County, your Honor.

MR. RAY: By that I mean the Sheriff's Office.

MR. NUZUM: I think that is immaterial.

THE COURT: The question is pretty broad, what he did on election day.

MR. RAY: Very well, your Honor.

Q. Did you supply an automobile—strike that. Did you have any conversation with Mr. Bloom on that day relative to your work?

A. Yes sir.

Q. And where was that?

A. Why, a few days later—in Mullan Inn.

Q. And when was this talk with Mr. Bloom?

A. It was a few days after election.

THE COURT: In 1928?

A. Yes sir.

MR. RAY: Very well, now then, go ahead and state.

MR. NUZUM: I object as incompetent, irrelevant and immaterial.

THE COURT: Objection is overruled.

MR. NUZUM: Exception.

A. Why, he just said that we had things our way again, we had Weniger in, and things were

going along pretty good, and he thanked me for what I had done.

MR. RAY: What had you done?

MR. NUZUM: I object as immaterial what he had done in election.

THE COURT: What he had done in connection with Bloom he may state.

A. I just donated my car to the boys for service to help them out.

MR. NUZUM: Now if your Honor please, I move to strike that. Bloom was not a candidate for office.

THE COURT: Denied.

MR. NUZUM: Exception.

MR. RAY: Q. Was Mr. Bloom present on election day at Mullan?

A. Yes sir.

Q. Did he have anything to do with the use of your car.

A. Yes sir.

MR. NUZUM: All of this with reference to election goes in under my objection, if your Honor please. I object to it as incompetent, irrelevant and immaterial. It does not make any difference what anybody does with reference to a state election.

THE COURT: The objection is overruled.

MR. NUZUM: Exception.

THE COURT: A conversation had with one of the defendants.

MR. RAY: Q. And did you supply your car?

A. Yes sir.

Q. What, if anything, did you do relative to banners or posters on your car?

MR. NUZUM: Just a minute, I object to that as incompetent, irrelevant and immaterial. That is not a conversation with the defendant.

THE COURT: Objection is overruled.

MR. NUZUM: Exception.

A. I carried a banner on the car to vote for Al Smith in the—

MR. RAY: Q. Who furnished that?

MR. NUZUM: I move to strike that, because Al is not a party to this.

MR. RAY: Just a moment, I can connect this up in just a minute with Mr. Weniger.

MR. NUZUM: As a democrat, I must protect Al.

A. I voted for him myself.

THE COURT: The statement of counsel is that he will connect it. I reserve the ruling. Unless, he does, why the Court also will protect Al."

The testimony was entirely immaterial to any issue in the case. When considered alone, it was not very prejudicial, because Mr. Weniger was up for reelection as sheriff and Bloom was his deputy and therefore interested in his election, but it is impossible to say what impression it made on the jury. The court was very liberal in allowing testimony offered by the district attorney, much of it immaterial, and the constant reiteration of immaterial matters must have made some impression on the mind of the jury.

Assignment of Error No. 17 refers to a question on cross examination of the government's witness, McGill, who had testified to a number of alleged conversations with Mr. Weniger and Mr. Bloom and prejudicial to them. The ruling is shown on page 297 of the Bill of Exceptions, as follows:

"MR. NUZUM: Q. And you have stated to numerous people that you did not care what became of the other people but you wanted to cinch Weniger and Bloom, haven't you?

MR. RAY: Just a moment, I object to that question.

THE COURT: The objection is sustained."

The question was a perfectly proper question on cross examination and if the witness had been permitted to answer it, he might have admitted that he had made the statements in question, and if he had done so, it would have much impaired the value of his testimony. The court evidently regarded it as an impeaching question to be followed by proof that he had made the statement asked about. In that case, the time, place and person would have had to be fixed in the question, but it was not an impeaching question. If the witness had denied making the statement, it would not have bound the defendants. Such questions on cross examination are permitted by the courts every day in the year.

Jones on Evidence (2nd Ed.), Sec. 823.

It is error to rule out such questions on cross examination.

People v. Lee Ah Chuch, 66 Cal. 662;

Schultz v. Third Ave. R. R. Co., 89 N. Y. 242;

State v. McFarlain, 6 Southern, 728.

Assignment of Errors from No. 58 to No. 96, both inclusive.

In explanation of these assignments, Cooper and Rogers, prohibition agents, had been in and around Mullan and Wallace from March 30th to June 15th, 1928. They operated under cover in Mullan and Wallace, going into places and buying liquor in both places, and making records of the same for future use.

Mr. Cooper testified that on June 15th, 1928; "I saw Weniger at the hotel. Rogers was with me, and I walked over to the desk and laid the key on the register, and Rogers preceded me to the door. Weniger stepped up and tapped me on the shoulder and said, "I want to speak to you.' So we walked up towards the front door out where Rogers was, and Weniger wanted to know what that fellow (Rogers) was. I said 'He is Rogers,' and he said, 'I want to talk to you fellows about some bad checks that have been passed up in Mullan you fellows answer the description of the fellows wanted for passing these bad checks,' and so Mr. Rogers figured that we were uncovered—

"THE COURT: No."

"A. Rogers said 'That is our identity,' and he opened up his coat and showed his badge to Weniger, and said 'This man is working for me.' Weniger said, 'Let us take a walk over to the

office,' so on the way it was stated by Weniger that he had a right to know everybody that was working in his county and their business. So we proceeded over to the office and went into the office and sat down and Weniger wanted to read Mr. Roger's credentials, so Mr. Rogers showed him a check and government papers and proved to him that he was a federal officer, and Mr. Weniger stated that there were a couple of men in there, detectives, working on those bad checks, and that they were not in at the time but had gone to Mullan and during the time he called in Charlie Bloom, and Charlie stood by the door and listened to the conversation, and the sheriff says, 'Well, those government credentials don't look like they could be forged very easily, and you fellows will be in tomorrow.' We assured him that we would, and Mr. Rogers said as soon as these fellows come back from Mullan, the detectives, that he wanted the sheriff would send them over to Rogers, as he wanted to talk to them personally, and the sheriff while I was there asked if I wrote any checks. I said I wrote checks, but they were American Express checks, that that is the way I signed myself before I went in there. Rogers received his money by telegraph from his folks at Seattle. After Rogers had shown Mr. Weniger his badge again and the government request for transportation, for the purpose of identification. Mr. Rogers asked the sheriff to show him these checks, but the sheriff said he did not have them, and that they would be back, and as soon as they arrived back from Mullan, he would send them over to us, and we left the sheriff's office. Neither Rogers nor myself saw either of the detectives Weniger spoke of, but he said their names were Hatch and Parnum.

"After leaving Mr. Weniger, we went back to the hotel and went up to Rogers' room. We did

not talk to anyone but Weniger and Bloom, and about fifteen minutes after we left the sheriff's office, Rogers sent me out to see if I could buy any drinks in town. I then left the hotel room and went to places in Wallace. I went to Jack Chisholm's place, next to the Banquet Cafe."

"Q. Did you try to buy there?

MR. NUZUM: I object as incompetent, irrelevant and immaterial.

THE COURT: In Wallace?

MR. LANGROISE: Yes sir, if your honor please, we will follow this up as a part of the same transaction in Mullan. It is a part of the activity of the defendant, Weniger, in connection with the conspiracy. It is all one transaction. We will show that he was unable to buy from then on and had been able to up to that time.

MR. NUZUM: I do not think that is admissible.

THE COURT: Objection overruled.

MR. NUZUM: Exception.

MR. LANGROISE: You may answer Mr. Cooper.

A. I could not buy. I had been in that place before.

Q. And you had been able to buy on every occasion before?

MR. NUZUM: Just a minute, I object as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. NUZUM: Exception.

MR. LANGROISE: Had you?

A. Yes sir."

(Transcript, pp. 502, 503, 504, 505.)

The witness then told of visiting the Pastime, the White Front, the Pool Room over the Wallace Corner, and the St. Francis in Wallace in each of which he

had bought liquor before, and in which he said he was refused liquor after the interview with Weniger.

The witness also went to Mullan and endeavored to buy liquor there, as he stated, at many places where he had bought it before, but without avail. It is not necessary to set out the testimony as to each place said to have been visited by Cooper. It was similar in every respect to that set out as to the visit to the first place, with objection interposed, overruled by the court, and exception taken. See Transcript pp. 504 to 514.

This witness sought to leave the impression that the interview of Rogers and himself with Weniger was phoney, in that Weniger sought it to uncover Rogers and himself for the purpose of warning the bootleggers in Wallace and Mullan.

On cross examination he admitted that he thought they had been uncovered around the 13th of June, two days before the interview with Weniger (Transcript p. 521). He also sought to leave the impression that the reason given by Weniger for seeking the interview with Rogers and himself was false and untrue. Mr. Rogers, on the other hand, who was a regularly commissioned prohibition officer (Cooper was simply his chauffeur), was fair in his statements. His statement was as follows:

"Cooper came down the stairs with me, and I gave him my key, and he took the two keys over to the desk. I preceded him out of the door and had started down the sidewalk when I heard someone talking to him. I turned around, and Mr. Weniger said to Mr. Cooper, 'Who is that man with you?' I stepped back and Cooper said to me, 'This is the Sheriff and the Sheriff wants to know of me who I was—'

He said he wanted to know who I was. I said to him 'I think my work has progressed far enough that I can let you know who I am.' I put my hand in my pocket like this (indicating) and pulled my coat back like this and showed him the badge, and said, 'Take a good look at this.' I held it back so that he could see himself that it was a Government badge. He said it looked too complicated to be counterfeited.

Q. What happened after that?

A. He said 'We have had some bad checks passed in this county, and I have had some men working on it, and they think you two fellows are the men that passed the checks.' I told him at that time that I was receiving my money—I believe I told him either there or his office—I was receiving my money by telegraph from Seattle, but Cooper was using traveler's checks.

Q. What occurred then?

A. 'Well,' he says, 'I would like to have you come up to the office anyway. I would like to talk to you.' and we started over toward the office.

Q. Just you and Weniger?

A. And Cooper. On the way over in his conversation he said that, 'Of course you realize that as Sheriff I have a right to know who is in this county, and what they are doing.' I told him at the time that he had a right to satisfy himself as to my identity, but as to what I was doing in this county was none of his business.

Q. Did you go to the Sheriff's office?
A. We did.
Q. And what occurred there?
A. We sat down, and on the way to the office he raised the point again, wanted to know where my little card was. He meant the pocket commission. I told him it was secreted in my suitcase at the hotel, but that I would get it for him if he wanted it. I felt there might be a little doubt in his mind.

He says that the car I was driving has got wrong license plates. He said, 'I have had them checked, and the license plates belong to a Ford car in Seattle.' I told him that was true, that these license plates were formerly plates that formerly belonged to a Ford car that had been cancelled, and had been given to our Department at Seattle by the Director at Olympia instead of providing the regular plates.

We went to the Sheriff's office and sat down. We talked about the car and Weniger says, 'This is Charles Bloom, my Deputy.' I saw Bloom there. After quite a bit of conversation we left the sheriff's office and I directed Cooper to do something in Wallace and afterwards went with him to Mullan. He gave me the various items as the result of his work. Cooper started in around Wallace not over fifteen minutes after we left the Sheriff's office."

On cross-examination, the witness said:

"I had told my business prior to seeing Weniger to two county commissioners, the county auditor, and I think one other gentleman in town. This was early in the work. I had also told Walter, the United States Commissioner, prior to the 15th (Bill of Exceptions, p. 534).

The witness testified further on cross examination:

> "I did not feel that we had been identified as prohibition agents, before we saw Weniger, but as special prohibition agents" (Bill of Exceptions, p. 534.)
>
> "I knew a man of the name of McCreary in Mullan. Got acquainted with him probably a month and a half prior to June 15th. I disclosed my work to him." (Trans. p. 539.)
>
> "I also disclosed my occupation to Marcus D. Needham, the government witness, and to Mrs. Jack Swanson. This was prior to the 15th of June. Also disclosed my occupation to Marie McGill, Mrs. Needham; I don't know whether Mrs. McCleary's son knew my identity or not. He might have.
>
> Q. So that here were about ten people in the Coeur d'Alene country knew what you were there for and what you were doing prior to the eventful 15th of June, weren't there?"
>
> A. Yes." (Trans p. 539.)

As to the bona fides of the reason given by Weniger for seeking the interview with Rogers, the witness said on cross examination:

> "I had no definite suspicions regarding anybody except Simmonds and his partner. They registered at the Ryan Hotel under their right names. I did not know Simmonds' business. I found out afterwards when we came to Spokane. I did not know that he was representing a number of banks on forged check matters. I saw one of the checks at Weniger's office. One had been given to Mr. George Newsome and one to the Theodore Army Store at Wallace. This was on the 15th in Weniger's office in the presence of Cooper. He showed

me one of them. He did not state that the reason they wanted to find out was because of the license plates not being issued for that car in that way. He did bring that point up."

There are two valid objections to the receipt of this testimony. It was too remote, too wide a jump on mere suspicion.

The writers on the law of evidence say that while the process of determining relevancy of testimony is strictly one of reason and logic, that is, whether the evidence offered has a tendency to prove the point in issue, and that relevancy does not ordinarily depend on probative force, all agree that the degree of probative force is a factor to be considered. The tendency to prove the fact in issue must be so real that it excludes the possibility of the jury acting on suspicion or conjecture. It is the duty of the judge, therefore, to protect the litigants from the possibility of that error. The predicate must have been laid to the satisfaction of the judge to exclude that possibility before the evidence is admissible.

The testimony shows that these prohibition agents had been operating in Shoshone County for about two and one-half months, securing evidence against the bootleggers and taking affidavits to support the same. The strong probability that the agents may have

been uncovered during that period of time ought to have been foreclosed against.

Next, there was no testimony offered as to the time that the witness Cooper had been able to buy liquor in the joints visited by him before his last visit. These two facts were essential to be proven before the testimony received had any degree of probative force. It merely created a suspicion, and persons accused of crime cannot be convicted on suspicion. Moreover, on cross examination Cooper testified that he had suspected that he had been undercovered on the 13th day of June, two days before the interview with Weniger and Bloom on the 15th day of June, and Rogers testified that he had disclosed his business to ten or twelve individuals in Shoshone County before the 15th day of June, to some of them very early in his activities in that county.

These latter facts would have shown the entire want of probative force if brought out before the introduction of the testimony, and shown that the judge ought to have required testimony on the subject before admitting the evidence and thereby throwing open to unwarranted suspicion the defendants in this case.

Second: As to the testimony of the attempts to buy in Wallace, it is outside of the scope of the con-

spiracy alleged in the indictment. That conspiracy was alleged to have taken place in the Village of Mullan. The Mayor and Trustees of the Village of Mullan, as well as the Chief of Police and night watchman were the principal actors in that conspiracy. The only connection of Weniger and Bloom with the conspiracy charged was inaction. At the same time Weniger and Bloom and the officials of the City of Wallace, together with a number of people who are alleged to have sold liquor, were under indictment for a conspiracy to violate the National Prohibition Laws in the City of Wallace. We take the liberty of mentioning this fact because a trial was subsequently had and conviction of certain defendants had on that indictment, and that case is now on appeal and will be heard at the same term of court that this appeal is heard, and the court will have the anomalous situation of having testimony in the Mullan case as to what took place in Wallace relied on in the Mullan case, and that same testimony together with other testimony offered to secure a conviction in the Wallace case. The objection that the defendants made as to the introduction of this testimony is found at page 504 of the Transcript, and there the assurance was given the court that this was all one conspiracy. That is, that it was a part of the activities of the defendant

Weniger in connection with the conspiracy, all one transaction. If it was all on transaction, then the Wallace conspiracy case should have been tried with the Mullan conspiracy case, but if by the prosecution of these two separate conspiracies, the United States Attorney, must now say that it was two transactions, two distinct conspiracies, then under the doctrine of *Terry v. U. S.*, 7 Fed. (2nd), 28, opinion by Judge Rudkin, the admission of this testimony was reversible error. A defendant being tried for a conspiracy is under enough handicap if the testimony is limited to that conspiracy alone without further being embarrassed by evidence which pertains to another conspiracy, and for which the prosecutor who is conducting the case on trial has induced a grand jury to indict the same defendant on the other conspiracy, and which indictment is pending at the time of trial.

The error in this case is absolutely on all fours with that considered in the case of *Terry v. U. S.*, supra. Judge Rudkin said in his opinion in that case that:

> "'The scope of a conspiracy must be gathered from the testimony and not from the averments in the indictment. The latter may limit the scope, but cannot extend it."

The indictment in this case limited the scope of the

conspiracy to the Village of Mullan. The testimony offered in the case also confined the conspiracy to the Village of Mullan. Therefore, what Judge Rudkin said in his opinion in that case in ruling that testimony of acts and conduct had another place than that shown to be the place of the conspiracy was prejudicial error sufficient to justify a reversal, and this without reference to what we have said concerning the indictment for conspiracy at Wallace.

Assignment of Error No. 116.

The court erred in denying the request of defendants' counsel to have the prosecutor state what prohibition law he was examining the witness, Bloom, about, as follows:

> "MR. LANGROISE: Q. Did you ever have any orders from the Sheriff's office with respect to the enforcement of the prohibition laws?
> A. I did.
> Q. And were they that you were not to pick them up?
> A. No.
> MR. NUZUM: Just a moment.
> MR. LANGROISE: Q. What were they?
> MR. NUZUM: I would like to have what he means by the prohibition laws defined, whether it is the State law or the National law.
> THE COURT: Objection is overruled.
> MR. NUZUM: Exception."

The question whether or not it was a part of the

duty of the defendants, Bloom and Weniger, to enforce the national prohibition laws, and whether a failure to enforce the state prohibition laws, from whatever cause, or for whatever reason, could have the effect of making the said officers parties to the conspiracy charged, will be argued later in connection with the charge of the court, and we will not pursue that argument now. We note the ruling of the court as showing clearly the theory upon which the case was tried below.

Assignment of Error No. 137.

In the action of the court here set forth, it will be seen that the court again enlarged the scope of the inquiry in overruling objection of defendants' counsel to the following question, propounded to the witness, Bloom, on cross examination:

> "Q. Just what did you do during the time you were deputy sheriff to apprehend any violators of the law or stop violations of the law?
> MR. NUZUM: I object to that as irrelevant, incompetent and immaterial, and request that the question be limited to liquor."
> THE COURT: Overruled."

Assignment of Error No. 144, as follows:

The court erred in denying the motion of defendants,

Weniger and Bloom to strike all the testimony in the case with reference to gambling and prostitution, as follows:

> The defendants, Weniger and Bloom, move to strike all the testimony in the case with reference to gambling and prostitution, as not in any manner involving a violation of any laws of the United States or any Federal law of any kind, character or description, and therefore not the subject of a conspiracy to violate any law of the United States.
>
> THE COURT: The motion is denied."

We will argue the question made by the ruling of the court, in connection with the charge of the court, and will not do so here, and merely set forth the error now for the purpose of marking fully the view on which the court below tried the case.

Assignment of Error No. 145, as follows:

> "MR. NUZUM: The defendant R. E. Weniger at this time moves the court to instruct a verdict of not guilty and discharge him for the reason that the evidence in this case does not show any conspiracy on the part of the said Weniger or any acts on the part of the said Weniger which would tend to violate the National Prohibition Law or any laws of the United States. I would like to be heard, if your Honor desires to hear me, on that question."
>
> "THE COURT: The motion will be denied."

In discussing this assignment, which is one of the most important assignments specified, we will endeavor to condense the testimony quoted as much as possible,

because this brief is already too long, but still we must quote at some length.

Mr. Weniger is a man forty-five years of age with a wife and three children, and a little home in Wallace. He is a man of most exemplary conduct, and never, as he testified, drank a drop of intoxicating liquor in Shoshone County, Idaho, during his nineteen years residence there. His character and standing in the community are of the highest. The most promient and outstanding citizens in the community testified that his character as an honorable, upright, law-abiding citizen was of the best. Those testifying were Ramsey Walker, Vice-President and General Manager of the Wallace Bank & Trust Company (Trans. p. 666); Harry L. Day, the largest owner in the Hercules Mine, and at present a large mining operator in Shoshone County, and a resident of that county for forty-three years (Trans. pp. 666, 667); Milton J. Flohr, a banker connected with the First National Bank of Wallace (Trans. p. 667); Norman Ebly, another banker, with the Wallace Bank & Trust Company (Trans. pp. 667, 668); Dr. T. R. Mason, a physician, former mayor of Wallace (Trans. p. 668) and A. H. Featherstone, District Judge for the First Judicial District of the State of Idaho (Trans. p. 689). He had been elected

three times as Probate Judge of Shoshone County and for times as Sheriff of the County.

The only testimony tending to connect Mr. Weniger even remotely with the conspiracy charged is to be found in a number of conversations had with him and testified to by the prohibition agents or their stool pigeons. The first of these was Anthony McGill, a former bootlegger in Mullan, who had been weaned away from his lawlessness by the prohibition agents, whether by moral suasion or otherwise, we do not know. He testified to having seen Mr. Weniger with others in his bootleg joint in Mullan during the campaign of 1928, and saw him at the bar with others who were drinking, but did not know whether Weniger took a drink or not. However, when the crowd went out he followed them over to the Bilberg and saw Weniger take a drink there (Trans. pp. 266, 267, 268). He next told of a conversation with Weniger at Wallace in the Sheriff's office. Weniger had sent for him to inquire about a report coming to him that McGill had been bottling beer in Wallace for the Elks Convention. McGill testified that Weniger jumped on him, and said:

> "What is this stuff going around here that you are making beer and fixing up beer for the Elks? And he made several accusations to try and rile me up, and I told him that they were false, and

we got to talking things over, and he says that I was up in that country stooling, that I was helping the government men out, that I was stooling on these joints around town, and that the companies—well, through the conversation he told me that the heads of the companies made him run these places, leave them run wide open, and finally it finished up, he told me to keep out of them joints anyway." (Trans. p. 269.)

McGill was probably the most perfect specimen of the genus bum, that the prohibition officers could have picked up in all the Coeur d'Alene country, as witness the following on cross examination:

"Q. You were acquainted with every prostitute in Mullan?

A. Practically.

Q. And you associated with every prostitute in Mullan?

A. In a business way I did.

Q. You also went to their houses and bought drinks?

A. Yes.

Q. Was that the business for which you went to their houses?

A. Not altogether.

Q. It was for intercourse, wasn't it?

A. Sir?

Q. It was for intercourse, wasn't it?

A. It was not.

Q. What did you go there for?

A. Just to be a good fellow, and buy drinks.

Q. You associated with every gambler in Mullan?

A. I did.

Q. You associated with every bootlegger in Mullan?

A. I did.

Q. Over a period of how long?

A. About a year, I guess.

* * *

Q. You thought there was nothing wrong in any way in associating with whores, pimps, gamblers, and bootleggers and men of that sort?

A. No sir, I was bootlegging myself.

Q. How long had you been in the bootlegging business?

A. Just from the 23rd of August until around New Year's.

Q. That was the only time you had ever engaged in it?

A. The only time.

Q. Prior to that time you had been an honest, hard-working miner?

A. Yes.

Q. You, as other men, earned your bread by the sweat of your brow at that time?

A. I do that right today.

Q. How long did it take you to acclimate yourself to association with these people you have described?

A. I have been around the world since I was a young boy, and I know.

Q. Did you find yourself or not, right at home with these people?

A. Certainly. (Trans. pp. 275-277.)

* * *

Q. Can you give us an estimate of how many drinks you averaged at the Bolo?

A. Well, I am quite a little drinking man.

Q. Well, can you tell the jury the capacity of what you term quite a little drinking man?

A. I can carry a good load.

Q. What does a good load consist of—how many drinks?

A. It is according to how you are feeling, and what kind of shape you are in.

Q. In average shape?

A. I can drink 25 or 30 drinks. (Trans. pp. 280, 281.)

* * *

A. I did not know the defendant Weniger until he came into my saloon prior to election. I never had any conversation with him but once that is when he called me to his office about the Elks. He told me that the clerk at the Ryan had stated I had told him I was bottling beer for the Elks for the state convention and we were doing that. I did not tell him so. He asked me if I was and I told him I had been where there was some beer. I did not tell him I was bottling beer for the Elks and did not deny it. He brought up the question to find out whether or not I was stooling for the Government. He asked me and I told him I was not. He did not ask me what I was doing around there; he told me that. He claimed I was stooling for the Government. I saw him drinking in Mullan during election campaign. He did not tell me he did not want any more talk about bottling beer for the Elks. He did not tell me unless I got to doing something he would vag me. He wanted to know about the Fond deal. We talked things over and he told me I had better cut out drinking around there, I had been drinking and was drunk when I was up there. I was under the influence of liquor always. I would take a drink occasionally. I never had any business with Weniger. I never had any talks with him. I did not know who he was when he was in my place in Mullan until I went with somebody and found out that he was Weniger. I had never had any conversation with Weniger at that time. All that was the matter with Weniger was that he was sore because the government men were in town

and he figured I was helping them." (Trans. pp. 282, 283).

In McGill's testimony that Weniger was in his place (the Mullan Inn) drinking, he fixed Mr. Ganlack, an attorney, as being with Weniger, and also Mr. Desbrow (Trans. p. 283).

Mr. Ganlack testified that he was never in the Mullan Inn with Mr. Weniger (Trans. p. 879). Mr. Desbrow testified that Weniger was never in the Mullan Inn when he was there (Trans. pp. 672-673).

Mr. Louis Ingebretson, a son-in-law of Mr. Desbrows', testified that he was at the Mullan Inn with Mr. Desbrow at the time mentioned by Mr. McGill, and that Weniger was not there (Trans. pp. 674, 675).

The reputation of the witness for truth and veracity was impeached by Walter Frank (Trans. p. 665). By John W. Murphey (Trans. p. 665); George A. Driscoll (Trans. p. 672); by Roy Smith (Trans. p. 671), and by Thomas Campbell (Trans. p. 272).

McGill was also impeached by Miss Lucile Anderson, who related the following conversation with McGill, which the latter had denied:

> "My name is Lucile Anderson. I reside at Mullan. I wait on table at the Good Eats Cafe and I know A. H. McGill who was a miner up there and who ran a cafe or soft drink parlor. I saw him in our dining room in April, 1929.

> Q. I will ask you, Miss Anderson, whether or not in your conversation in your dining room in April, 1929, yourself, McGills' wife and McGill being present, if McGill didn't state in that conversation that he wanted Bloom to collect some money that was supposed to be owing to him from Charles Fond, and that Bloom would have nothing to do with it, and that then he said, 'I am going to fix that son of a bitch Bloom,' and that 'I am going to raise a lot of Hell, and I will be the man to give testimony against Bloom and Weniger,' or words to that effect and substance?
> A. Yes." (Trans. pp. 659, 660.)

Miss Anderson also impeached McGill's credibility (Trans. p. 660).

McGill was again impeached by Charles Fond. McGill had testified that Fond, a partner of his in the Mullan Inn, had directed him to give Deputy Bloom $30.00 and that he gave Bloom $30.00, and that Fond told him later that he had to put up a little money once in a while to keep them in good spirits.

Mr. Fond testified:

> "I heard the testimony of McGill that I ordered him to give Bloom thirty dollars. I know nothing about that. I never told him to give any money * * * I never knew of McGill giving him any money nor never did McGill represent to me that he had given him thirty dollars." (Trans. p. 667.)

If, after his own disclosures as to his life and character anything more was necessary to mark him

him as a reckless and unscrupulous liar, then it was supplied by the sworn contradictions of his testimony and by the thorough impeachment of his character for truth and veracity. The government did not undertake to sustain his character on rebuttal.

But if everything McGill testified to be taken as true, it does not at all prove or tend to prove Mr. Weniger to have been a party to the conspiracy charged. It might, if credible, tend to show that Mr. Weniger did not like the federal enforcement officials and their methods, and was not disposed to assist them in their work. The statement of the witness McGill that Mr. Weniger said to him that the "heads of the companies (the mining companies) made him run the joints, made him leave them wide open" is so incredible and preposterous as to be valueless as testimony. First, it is incredible that a man of Weniger's standing and good sense would discuss such a matter with a man of McGill's character, especially as McGill says that Weniger suspected him of "stooling" and was trying to ferret him out. Second, it is incredible that the heads of the mining companies could or would endeavor to influence Weniger in favor of the bootleg joints. The mining companies' interest in having their employes work steadily and continuously and skillfully, all of which would be prevented or

much impaired by the use of moonshine whiskey by their employes. Finally, what is to be implied from the statement of Weniger, if he in fact made it, that the "heads of the companies made him leave the joints run wide open?" Merely that he did not interfere with the joints, that he did not enforce against them the laws of the State of Idaho. There is nothing in that to connect Weniger with the Mullan conspiracy. Moreover, the statement of Weniger, as told by McGill, did not apply to the joints at Mullan. The conversation was about his "stooling on these joints around town." That is, in Wallace, where the conversation took place. Wallace is again fixed as the *locus in quo* of the conversation by the concluding words of McGill, "all that was the matter with Weniger was that he was sore because the government men were in town, and he figured I was helping them." (Trans. p. 283.)

William Barron was another witness who testified to a conversation with Weniger. His testimony was as follows:

> "On the 7th of August I was in Wallace and saw R. E. Weniger, the defendant. He arrested me. I was walking down the street and saw him and another lady and Bloom talking together; the lady we used to call Barney. She was from Mullan. She was over the Marble Front keeping a sporting house. I saw her, Weniger and Bloom

together. They were talking. I was walking by on the street. This lady came over to me and tried to call me dirty names and everything, and she reached her hand for me and I just took her hand to knock her hand down so she would not hit me, and she lay down and so Weniger and Bloom came over and arrested me and throwed me in jail. After I was arrested and thrown in jail I saw Johnson and Webb come into the jail about a half hour later. I heard a conversation between Weniger and Johnson and Webb. Chief Needham was present, and when Johnson and Webb came in Weniger says, 'I got your Federal stool pigeon here.' Weniger said that. He said, 'What do you mean by it?' Then after they called me out they wanted to know if I was a Federal man or if I was not."

Q. Who did?

A. Weniger, and they had quite a few heated words between them. He says, 'I wish you would stay out of my county,' he said, 'I can look after my county better without your help.'

Q. Who said that, and to whom was it said?

A. Weniger.

Q. To whom did he say it?

A. Well, Webb and Johnson was there.

Q. Did you keep any records of your buys or any purchases of whiskey that you made?

A. I did. I kept it in a little book, and had that book on me at the time I was arrested by Mr. Weniger, and when he searched me and found the book and looked it over he bawled me out, he says, 'You should not do anything like that, go ahead and stool on these people.' I said, "I did not stool. I warned them before. I told them I was going to do it.' Weniger said to me, 'I will deport you into Canada if you come up here from Canada and try to get smart. I will deport you to Canada.' This conversation was in Wallace,

Shoshone County, Idaho. Needham was there but I do not think he was there at the time that he told me that he was going to deport me, just me and Weniger was there at the time he was telling me he was going to deport me and was bawling me out after he looked over the book."

(Trans. pp. 422, 423.)

On cross-examination, he said:

"The first thing I heard Weniger says was, 'I got your Federal stool pigeon over here, gentlemen, is he a Federal man or what is he?' He said, 'I wish you would keep out of my county, I can look after my county better without your help.' That is all I remember."

(Trans. p. 426.)

Q. Then as I understand you, you did not tell Weniger that Fitzgerald had told you that if you would go there and get these bootleggers in Mullan you could make a thousand dollars?

A. Yes, sir, but this was not Fitzgerald's case, this was my own case. I told Weniger that Fitzgerald told me that. He has got the statement of it, too, and that is after I got beaten up inside the jail. I told him that, but it is not true. I had to tell something to get out of my case. Sure I made up the story myself."

(Trans. p. 427.)

Further, on cross-examination:

"The woman I had trouble with was named Barney. I got sore at her because I got a disease from her."

We submit this testimony without comment except to say that it cannot by the wildest stretch of the

imagination be of value in connecting Sheriff Weniger with the Mullan conspiracy.

Julius Johnson, a prohibition officer, testified as to the conversation in the Sheriff's office, testified to by the former witness Barron, as follows:

> "I went to the jail at Wallace on August 7th; saw Weniger, Deputy Sheriff Bloom and Ex-Chief of Police Needham and Webb and Weniger were in the room when I first went there.
>
> Q. What did Weniger say to you at the time you came in there.
>
> A. I rapped on the door and he opened the door and he says, 'I got your God damn stool pigeon in here—what is he, a Federal man or a stool pigeon? I says he is neither, that he is an ex-officer from Mullan. He says, 'Well, we got him for hitting a woman out on the street and knocking her down.'
>
> Q. Was there any other conversation at that time between Webb and Weniger?
>
> A. Mr. Needham at that time spoke up and says, 'He hit a woman,' and Webb spoke to Needham—told him that he thought he would have all he could to take care of his own town without coming to Wallace trying to police that town, and at that time Weniger—Weniger told Webb, 'Webb,' he says, 'we can run this county up here without your help, without the help of the Federals,' and then they got into quite an argument for a few seconds.
>
> Q. During the time you were on that trip did you see Barron?
>
> A. I did.
>
> Q. Where?
>
> A. In the office.

He testified to a further conversation as follows:

"August 14, 1929, we made a number of raids through the country. After these raids at that time I had a conversation with the defendant, R. E. Weniger. It was between the Commissioner's office and the county jail. I don't recall who was present. I know Weniger and I were in the conversation. The first thing Mr. Weniger wanted to know if Glen Stowe was a Federal Officer and referring to Glen Stowe, a deputy sheriff of this county. I told him that he was not. He says, 'Well, what business has he got up in this county?' And I told him that he was with us to help make these raids, and he then said if Sheriff McDonald wanted to police that county up there he would turn it over to him. He said that he and Charley Summerfield seemed to want to run this county."

(Trans. pp. 446, 447.)

Mr. Johnson testified to a still further conversation with Weniger as follows:

"I did not have occasion to go to Shoshone County and talk with the Sheriff with respect to our work and his assisting me until two years after I had been appointed at the time when my post of duty was moved to Wallace. That was in 1927.

Q. I will ask you whether or not you asked him for any help.

MR. NUZUM: I object as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. NUZUM: Exception.

MR. LANGROISE: Q. Just give us the conversation at the time that you first talked to him.

MR. NUZUM: I object as incompetent, irrelevant and immaterial on behalf of Weniger and Bloom.

THE COURT: Overruled.
MR. NUZUM: Exception.
MR. LANGROISE: Q. Go ahead, Mr. Johnson.
A. I told Mr. Weniger that I was going to be stationed there, and also asked him if there would be any chance to get a little help if a fellow needed it, and he told me that he had all he could handle without doing anything with the prohibition, and that his men, referring to his deputies, was under bond, that if they would go out with us fellows we might shoot somebody and he would get in trouble over it.
Q. Now, has Sheriff Weniger at any time from that time on given any assistance in the apprehension or the gathering of evidence against violators of the liquor laws in Shoshone County to you?
MR. NUZUM: I object as incompetent, irrelevant and immaterial.
THE COURT: You mean this witness?
MR. LANGROISE: This witness, yes.
THE COURT: Overruled.
MR. NUZUM: Exception.
A. He has not given me any.
(Trans. pp. 447, 448, 449.)

On cross-examination, the witness again gave his version of the conversation at the time of the arrest of Barron:

A. I am not mistaken about that.
With reference to the witness Barron, when I came in there Weniger told me he had arrested a fellow for knocking a woman down. He asked me whether or not he was a Federal Agent or a stool pigeon I was using, and I told him he was not working for us. Then Needham spoke up

and said that the fellow did knock the woman down. Then Webb spoke up and said to Needham that I should think you would have enough to do up at Mullan without coming to Wallace.

Q. And then it was that Weniger turned to you men and said—that is, turned to Mr. Webb and said that he, Weniger, felt he could run the things in this county also, didn't he?

A. Yes sir.

Q. And that was with reference to this fellow that he had arrested and that is what the talk was about?

A. That is what we were talking about.

Q. Yes, sir, and you understood it that way, didn't you, Mr. Johnson, just a few words—that was caused by Needham and Webb in the first place.

A. Well, they are the ones that got in the argument.

Q. They got in the argument and then I don't suppose that you cut in but Weniger did.

A. Yes sir.

(Trans. pp. 450, 451.)

Sam Webb, another Prohibition officer, testified to the conversation in the Sheriff's office at the time Barron was arrested, as follows:

"I was in Wallace on the following morning, August 7, 1928, and went to the Sheriff's office. Julius Johnson went with me. We saw Sheriff Weniger, Deputy Sheriff Bloom and Mr. Needham, Chief of Police of Mullan. When we went in Weniger's first remark was, 'We got your God damn stool pigeon in jail for knocking a woman down on the street out here,' and he wanted to know if he was a Federal man or an ordinary stool pigeon. Mr. Johnson told him

that he wasn't any stool pigeon, that he had volunteered some information and that we had acted upon it, and that was most of the conversation as I remember it. Then the following conversation took place with respect to the operation or the handling of the county. That conversation followed a short conversation that I had with Mr. Needham. Mr. Needham butted in in a way and says, 'We just seen this fellow knock a Mullan woman down on the street.' In answer to that I said to Mr. Needham, that it seems to me that you would do well if you kept your own town in good shape, instead of coming down here, jumping onto somebody that is assisting us, and then the Sheriff told me that he could run his county without our help, and then there was some quarrelling between him and I and that was passed over."

(Trans. pp. 461, 462.)

The witness then testified to the following conversation with Weniger:

"I first met Weniger near the end of 1924 on my first visit to Shoshone County, at his office.

Q. Did you at that time talk with him, or did he talk with you about any help to be given in the enforcement of the liquor laws in that country?

MR. NUZUM: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. NUZUM: Exception.

A. We did have a conversation along that line.

Q. Give that to the Court and Jury as best you can.

MR. NUZUM: Same objection.

THE COURT: Overruled.

A. I had a conversation with him along that line.

THE COURT: Relate, as nearly as you are able to what you said to him and what he said to you, and don't characterize it. Just state what happened.

He told me that he had been elected by the wet element of the county, and he didn't choose to do any work along the enforcement line, and for that reason he wouldn't take any part in our work, or give us any assistance. On August 14th, 1929, I went with other officers to make raids in Shoshone County, and immediately following these raids I had a conversation with Weniger in front of the court house in Wallace, Idaho. He said, 'the first remark by the Sheriff, as I remember it, was that he asked me why we didn't move to Wallace and make christians out of all the persons living there, or words to that effect, and he told me also that he wanted to get into this court, that if he was brought into court he would go somewhere in the East. I do not recall the name of the town, and was going to secure the services of Clarence Darrow to defend him. Also he told me that he was going back to Washington to see if he couldn't—if the Democrats couldn't talk to Senator Borah.

Q. About what?

A. About the Federal Court in Coeur d'Alene." (Trans. pp. 462, 463.)

The cross-examination of Webb while not particularly informing is interesting as showing the bent of mind of these prohibition agents that nothing is of any importance in life except their undercover work in enforcing the prohibition law. We insert the following from his cross-examination:

"Weniger said, 'We got your God damn stool

pigeon in jail.' I am positive of that. Weniger said that this stool pigeon had knocked down a woman here on the street; that Barron had. The remarks were all continuous; there were no periods or commas. Needham then said this man had knocked a woman down. I resented Needham saying that because I did not think it was any of his business.

Q. You didn't think it was anybody's business, if you saw a great big man knock a woman down, to say anything about it?

A. No, as long as the Sheriff and his Deputy was there.

Q. You thought he could keep absolutely still and make no observations when he saw a man assault a woman?

A. I spoke my thoughts to him at that time. I thought he could keep busy in the city of Mullan as long as they were operating a Chief of Police without assisting us in our work in the town of Wallace.

Q. Now, didn't you say that you thought he could, on your direct testimony, thought he could attend to his business in Mullan without interfering with the man that was assisting you—isn't that your direct testimony?

A. I do not think so.

Q. Do you remember what you said?

A. Pretty well.

Q. What were you objecting to if he wasn't interfering with or had arrested a man assisting you—so far as Needham was concerned what were you objecting to?

A. My main objection was interfering with our work.

Q. Did it interfere with your work if one of your men assaulted a woman and knocked her down on the street for the officers to arrest him.

A. No, I wasn't objecting to the right of the officer to arrest him.

Needham told me he saw the man knock her down and I thought Needham should attend to his own business, and it was then that Weniger said to me, 'I will attend to business in my county.' That was a part of his answer, and without help, he said. The only reason for the conversation was the arresting of the man that we were talking about."

(Trans. pp. 465, 466.)

The testimony of Cooper and Rogers, Prohibition Agents, who testified to a talk with Weniger at his office when they disclosed their identity to him, and that immediately thereafter they undertook to buy liquor in Wallace without avail, and later did the same thing in Mullan, has been fully discussed on pages 45 to 56 of this brief in connection with another assignment, and we trust that the court will turn to those pages and read the testimony of those witnesses, and the observations made by us with respect to the same. We are attempting now to array all the testimony having any tendency to connect the defendant Weniger with the conspiracy charge in order that this court may have it all before them in considering this assignment. The testimony was received by the court on the theory that because the agents' identity had been disclosed to Weniger, and because they could not thereafter buy liquor in Wallace or Mullan,

that Weniger had tipped them off to the bootleggers in both places. Mr. Rogers admitted on cross-examination that he had told his business in Shoshone County to ten or twelve different persons in that county, some of the very early after his entrance into the county. If the testimony had any relevancy before the cross-examination, the facts therein disclosed destroyed its relevancy, and reduced the conclusion to be drawn from the incident to the barest suspicion.

One other conversation with Mr. Weniger and we will have all the testimony introduced by the government bearing on his connection with the Mullan conspiracy.

Mr. Ray Sheridan, a newspaper man, testified as follows:

> "MR. LANGROISE: Q. I will ask you, Mr. Sheridan, if during the afternoon of December 18, 1929, in the corridors of this courthouse, you and Mr. Weniger being present, if Mr. Weniger did not say in substance and effect this to you: 'The reason that I am in this jam with the Federal authorities, is that during my term of office as Sheriff of Shoshone County I have steadfastly refused to cooperate with the Federal dry agents and would not allow myself and men to become stool pigeons for the prohibition officers.'
>
> A. He did.
>
> Q. And did he at the same time and during the same conversation, with the same parties present, state in substance: 'For the last year Shoshone County has been overrun with under-

cover agents of the dry forces until it is now impossible for a stranger to enter the boundaries of the county without being placed under suspicion.'

MR. NUZUM: The some objection, if your Honor please.

THE COURT: Overruled.

A. Yes sir.

MR. LANGROISE: Q. And if during the same conversation and during the same time and the same parties being present, if he did not state in substance and effect: 'That during the period that I have served as Sheriff of Shoshone County, I have minded my own business, pursuing and catching law-breakers, and when complaints against bootleggers and liquor handlers were registered in my office arrests were made, but I did not send my men snooping into the personal affairs of the citizens of the community.'

MR. NUZUM: Just a moment. The same objection.

THE COURT: Overruled.

A. He did."

(Trans. pp. 757, 758.)

Mr. Weniger denied the conversation with Mr. Sheridan, not that it mattered much, because he had given an interview to the Wallace Press Times, very similar to the interview testified to by Mr. Sheridan, and counsel for Weniger then offered in evidence the Press Times' interview, which the court would not permit to be received in evidence.

(Trans. pp. 961, 962.)

The interview as testified to by Sheridan represents

fairly the attitude of Mr. Weniger concerning federal enforcement in Shoshone County. He has of late years steadfastly refused to cooperate with the federal dry agents, and would not allow himself or his men to become stool pigeons for them. The reason for his action or nonaction in that respect is explicable to everybody familiar with the reign of terror in Shoshone County since the enforcement officials determined to clean up communities therein. The miners and their wives are principally foreigners from Northern Europe, who before they left the place of their birth, and whose fathers before them, made wine and beer for domestic use and they brought their habits in that regard to this country with them. The government posed their undercover men in the several mines, employing miners where they could find them willing to do the work. These undercover men, thus employed, were enabled to visit the families of the miners in their homes and were treated to either wine or beer, and if not treated voluntarily they asked for it, but buying it preferably, and in some cases when money was refused leaving money on a table or a sewing machine or some other article of furniture, so that they could testify that they had paid money for their entertainment.

The writer of this brief attended the November, 1929, session of the Federal District Court for the Northern Division of Idaho held at Coeur d'Alene, Idaho. Entering the federal building he found all its corridors crowded and the court room full to suffocation, and on inquiry was told that most of those in the court room were defendants under indictment, and those in the corridors their friends. It took the court from ten in the morning until five in the afternoon to arraign and receive pleas from those indicted, most of the pleas being guilty, under the advice and assistance of the District Attorney and the Prohibition Agents gathered in the bar for that purpose. The writer saw an old woman, a grandmother, assisted out into the space before the Judge's bench, who, after looking around the court room with a glance of despair, was assisted by some one of the prohibition officers in entering a plea of guilty. He saw a young woman with two very small children hanging to her skirts, also arraigned at the bar, the little children smiling in glee at the novelty of the occasion, while the poor mother glanced around blankly for succor or support or sympathy. He saw young girls, hardly attained to the state of puberty, arraigned and sentenced to fines and imprisonment in the county jail, and he saw old men, middle aged men and boys under-

go the same ordeal. He was reminded of Macauleys' story of the bloody assizes, except that Judge Cavanaugh was kind and considerate, and looked troubled at the unpleasant task before him. Enforcement officials who could thus pursue ignorant men and women, who before their entrapment and arrest were void of any idea of wrong or guilt, were not only doing a gross injustice to those men and women, but were working a great wrong to the nation in inculcating in the minds of the people of the communities thus persecuted that our great and beneficent government was one of cruelty and intolerance. If Mr. Weniger conceived a prejudice against these prohibition agents, and refused to assist them in their work, it would seem to an ordinary mind, not influenced by fanaticism, that he was well justified in his attitude. There is nothing else in the case against him, unless the testimony of the vile, debauched, malevolent and untruthful McGill that Mr. Weniger told him that he had been compelled to let the liquor joints run wide open, be considered as showing guilt on his part. We have discussed that incident in another connection, and will not now repeat the discussion.

Finally, there is no testimony, and no contention on the part of the government that Mr. Weniger profited in any manner or form from the transactions carried

on at Mullan. In that feature this prosecution is different from any conspiracy case we have found in the books. It is difficult to believe that a man of Mr Weniger's standing before the people of Shoshone County would engage in a criminal conspiracy against the government with no other motive than distaste for the manner of federal enforcement in his county.

There are some appellate courts which refuse to interfere if there is any testimony, however discredited, or however inherently untrue, upon which the jury might have founded a verdict. But this action of the court here was before the verdict, and if the lower court should have withdrawn the case as to Mr. Weniger from the jury, as requested, and did not do so, and that is assigned as error, then we submit that this court ought now to do that which the lower court out to have done and refused to do.

All the courts insist that there must be *substantial* evidence of guilt in order to justify a conviction.

Wright v. U. S., 227 Fed. 855;

Union Pacific Coal Co v. U. S., 173 Fed. 740;

Nosowitz, et al v. United States, 282 Fed. 575;

Yusem v. United States, 8 Fed. (2nd) 6;

Ridenaur v. United States, 14 Fed. (2nd), 888;

Van Gorder v. United States, 21 Fed. (2nd), 939;

McLaughlin v. United States, 26 Fed. (2nd) 1;

Sugarman v. United States, 35 Fed. (2nd) 663;

Ching Wan v. United States, 35 Fed. (2nd) 665.

Here, as we have shown, there was no testimony whatever of any act on the part of Mr. Weniger connecting him with the conspiracy, and nothing to be drawn from the conversations testified to by the agents or their stool pigeons, which showed anything more than inaction on his part. As to these conversations, the one making most against Mr. Weniger was that testified to by McGill, and that witness, we have shown, was so thoroughly impeached that his testimony was worthless for any purpose.

In *Jones v. Harris,* 122 Wash. 69; 210 Pacific, 25, it was said of such testimony:

> "Testimony of disinterested witnesses as to admissions, when corroborative of other evidence, is sometimes evidence of a most convincing character. But when, as here, the testimony is that of interested witnesses, is not only not corroborated, but is shown by undisputed evidence to be in a large decree contrary to the actual facts, and is relied upon to prove the entire case, it cannot be said to rise to the dignity of evidence. If it were other-

wise, the citizen's right of personal liberty and right of private property stands upon a very shadowy foundation.

This court early in its history discarded the scintilla of evidence doctrine, and has uniformly held that a verdict to be sustained must be supported by substantial evidence. Applying the rule to the present case, fortified by the case of *Ludberg v. Barghoorn*, supra, we hold that the present verdict and judgment is not supported by substantial evidence."

The opinion in this case is by Mr. Justice Fullerton, an able and conservative judge who arrays the authorities on the subject, among others *Garrison v. Akin*, 2 Barb. (N. Y.) 25, in which it was said:

"There have been but few judges of elementary writers, who have not had occasion to speak of the character of this kind of evidence; such is the facility with which it may be fabricated, and such the difficulty of disproving it, if false. It is so easy, too, by the slightest mistake or failure of recollection, totally to pervert the meaning of the party and change the effect of his declarations, that all experience in the administration of justice has proved it to be the most dangerous kind of evidence, always to be received with great caution, unless sustained by corroborating circumstances."

Judge Fullerton said further of testimony as to such admissions:

"An examination of the cases on the question collected in 22 C. J. 290, et seq., will show that the courts themselves, when they have been the trier of the facts, have generally refused to give such evidence credence when contradicted and unsupported by any corroborating circumstance,

and this even where the witness testified was not a party to the cause, and otherwise had no apparent reason for misinterpreting or misstaging the admissions to which he testified."

Assignment of Error No. 146.

This assignment relates to the refusal of the court to instruct a verdict of not quilty as to the defendant Bloom, and to discharge him, as follows:

"MR. NUZUM: The defendant Charles Bloom moves that the Court instruct a verdict of not guilty and discharge him for the reason that the evidence in the case wholly fails to connect him in any manner with a conspiracy to violate the National Prohibition Law or any law of the United States or to do anything more than to show perhaps a knowledge of the violation of the state law in reference to gambling in some instance, nothing with reference to prostitution, and that therefore there is nothing to be submitted to the jury in so far as he is concerned."

THE COURT: Motion is denied.

MR. NUZUM: Exception."

(Trans. p. 764.)

Fortunately Mr. Bloom was not considered sufficiently important to justify the agents and undercover men engaging him in conversations and then testifying falsely as to statements made by him which, if not false in their entirety, were so highly colored as to make them false in fact. There was very little testimony which at all tended to incriminate Mr.

Bloom. That testimony was given by the impeached and self-impeached witness Anthony McGill, who testified:

"I was never interfered with by Mr. Bloom, I was assisted by him once. There was a raid on one evening up there, it was along about Christmas time in 1928.

Q. Do you know whom the raid was being staged by?

A. Why, I know that Mr. Webb and Mr. Johnson were there and I heard that Mr. Foster was with them; Webb and Johnson are Federal Prohibition Agents. I did not see Mr. Foster.

Q. What happened as far as Mr. Bloom is concerned?

A. Mr. Bloom came in the place and told me that they were raiding and I was wondering what to do. There was quite a few drunks around, and he says, 'You got your car here, get the stuff in the car and get it out of here, get it out of the way,' and we started to taking it out and then there was another defendant here in the case, he says, 'get out of the way,' he says, 'I will take it.'

Q. Who is that?

A. Jack Malloy. I was not raided on that occasion. They left. I later had trouble with Mr. Fond over the place. I later had a conversation with Mr. Bloom, the defendant, in front of Harwood's about my trouble with Fond.

Q. State that conversation?

A. Oh, well, we just met and I told him that I had went down and paid the taxes on the fixtures and that I was going to try to make a go of it, I thought maybe I could, and I was going to make some arrangements with Mrs. Rantella, the woman that owned the fixtures.

Q. What did Mr. Bloom have to say?

A. Well, he said, 'You might as well go ahead and maybe you can make a go of it, all right.' So he told me there is no use trying to buck Charley because he did not have anything. Charley is Charley Fond."

(Trans. pp. 261, 262.)

On cross-examination, McGill testified that:

"A. I went out of the place with Bloom, yes, if I remember right. I am pretty sure I went out of the place with Charley Bloom that night and went over to the Hunter to find out about it.

Jack Malloy was there all of the time this was taking place and Jack said, 'Go on, I am an old man,' or something, 'I don't care whether I am in jail or not and I will take the fall.' And Bloom says, 'Well, there is no use arguing with him, let him go.' I left the old man there to take the fall.

(Trans. p. 285.)

To the other impeachments of McGill's truthfulness, we now add another. McGill testified that Jack Malloy was in his joint when Mr. Bloom came in, and as he said, notified him that the federal officers were in town and raiding, and offered to assist him, saying, "You got your car here, get the stuff in the car and get it out of here, get it out of the way." (Trans. p. 262.)

Mr. Malloy testified, denying that Mr. Bloom was in the joint at the time of the threatened raid. He said:

"I heard the testimony of McGill when he said

> something about Federal raids. I was in there the evening of the threatened Federal raid. It was on the 26th of December, the evening after Christmas. Bloom was not in there that day. I saw Bloom in the Mullan Inn once. A couple of evenings before Christmas he brought me a letter addressed by my sister from the Sheriff's office. McGill was behind the bar and Bloom came in and he said 'Is there a man named Malloy here?' I said, 'Yes.' He said, 'There is a letter, give him that.' That is the only time I ever saw him in the house."
>
> (Trans. p. 676.)

If McGill was worthy of belief this testimony of McGill might be sufficient to show such aid and comfort to one of the conspirators as to make Mr. Bloom *particeps criminis* to the conspiracy charged. We have already discussed in connection with the motion to instruct a verdict for Mr. Bloom the question whether this court ought to affirm a judgment when there is any testimony whatever to sustain a verdict, although the testimony be so discredited as to make it unworthy of belief, and refer to that discussion in connection with this assignment of error.

McGill testified also to the election incident allowed by the court over objection and exception (Assignments of Error Nos. 14 & 15.) But that incident was so inconsequential that it carries no injurious implication against Mr. Bloom. McGill testified to one other incident as follows:

"Q. Now then, had Mr. Fond said anything to you prior to that time as to what you were to do with Mr. Bloom?

A. Yes sir.

Q. What did he tell you?

A. Why, he told me one day, he came in and asked me how much money I had in the register, and I told him, and he said, 'Well when Charley Bloom comes over, Charley Bloom will come over, why give him thirty dollars of it for me.'

Q. Did Mr. Bloom come in?

A. Mr. Bloom came in and I handed it to him.

Q. Was there anything said?

A. No, sir, there was nothing said about it, but Charley Fond had told me that we had to put up a little money once in a while to keep them in good spirits.

THE COURT: I want to be clear about this. Whom was it you say told you to turn this thirty dollars over to Bloom?

A. Charley Fond.

MR. RAY: Q. He was your partner in running the Mullan Inn?

A. Yes, sir, he was the boss and he carried the keys to the register and all that stuff at the time."

(Trans. pp. 263, 266.)

This testimony cannot have any effect as showing Mr. Bloom's complicity as one of the consirators. Conversations between co-conspirators are not competent for that purpose, and since Mr. Bloom was not otherwise proven to be one of the conspirators, the testimony amounts to nothing. But McGill was again impeached by the testimony of Fond, his partner, who

said that nothing of the kind ever took place. Fond said:

> "I heard the testimony of McGill that I ordered him to give Bloom thirty dollars. I know nothing about that. I never told him to give him any money. I never knew of McGill giving him any money or never did McGill represent to me that he had given him thirty dollars."
> (Trans. p. 677.)

We submit that any acceptance of McGill's testimoney by the court for the purpose of affirming the judgment against Mr. Bloom is repugnant to every sense, lay or judicial, of what is due persons accused of crime, and that this court on a technical and irrational rule should not give it any significance whatever.

This is all that there was against Mr. Bloom. His family lived in Mullan, but he was a Deputy Sheriff in charge of the jail at Wallace, and did not return to his home except once a week and then overnight. He had a better opportunity, however, to know what was going on at Mullan than Mr. Weniger, but that he had no part in the conspiracy, unless the fact that he knew what was going on and did nothing to stop it, connected him with the conspiracy, will be manifest when the court looks through the testimony to find any incriminating fact against him other than that testified to by McGill.

Assignments of Error No. 149 and 150.

These assignment relate to the general charge given by the court to the jury as follows:

> "With respect to the defendants, R. E. Weniger and Charles Bloom, Sheriff and Deputy Sheriff respectively of Shoshone County, Idaho, and the defendants, R. O. Welch and Hartcourt Morphy, policeman of the village of Mullan, Idaho, I instruct you that these defendants are not on trial for the mere failure to enforce the prohibition laws, state or national, in the village of Mullan or in the county of Shoshone. These defendants are not accused of acts of omission but of commission, namely, that they entered into the conspiracy described in the indictment to violate the prohibition laws of the United States in the particulars set forth in the indictment."
>
> "But, gentlemen of the jury, in this connection I instruct you that where individuals are the occupants of a public office or offices and whose duties in whole or in part require of them the enforcement of the liquor laws and the arrest of those engaged in such law violation, and it is made to appear that within the jurisdiction of such offices, such laws are openly notoriously and continuously violated in such manner and under such circumstances that the jury is satisfied beyond all reasonable doubt that such peace officers in fact knew of such flagrant, open and continuous violations, if you find there were such and that such officers did little or nothing to enforce the laws that were being violated by arresting those engaged in their violation. These are facts and circumstances which you have a right to take into consideration together with all the other facts and circumstances disclosed by the evidence in the

case as shedding light on whether or not such peace officers, or any of them, actually joined the conspiracy charged in the indictment and aided and permitted its execution. In such circumstances you should inquire whether such acquiescence in such law violation, if you find there was such, was due to mere negligence, inefficiency, incompetency or inability to perform the public duties devolving upon such officer or officers or was the conduct passive and intentional with full knowledge of a conspiracy to bring about such violation and was passed with a view and for the purpose of protecting and aiding it. In other words, was the inaction or acquiescence, if any, due to a mere failure of duty, or was it a passive refraining from performing the duty with the knowledge of the violations for the purpose of aiding and assisting in the conspiracy to violate the laws which were being violated?

Mere lack of diligence in the performance of their duties on the part of public officers is not enough. There must in addition be proof of knowledge of facts showing an intention on the part of the officers in question to aid in the unlawful act by refraining purposely from doing that which they were by the duties of their office bound to do, with the intent and for the purpose of becoming a party to and aiding in the execution of a conspiracy to violate those laws. This you must determine by your verdict in the light of all facts and circumstances disclosed by the testimony in the case."

It will be noticed that the charge seduously avoids informing the jury what the duties of public office are under the laws of the State of Idaho, in regard to the enforcement of the liquor laws and the arrest of

those engaged in such violations. That no doubt was intentional, because it was the theory of the court all through the trial that the failure on the part of the state officers to enforce the state laws was sufficient to connect them with the conspiracy to violate the laws of the United States. That, we submit, is not the law. It was not any part of the duties of the sheriff or his deputies to mop up and attempt to stop violations of the laws of the United States, however frequent or flagrant they may have been. The Supreme Court of the United States in a very late case has held that state officers are not officers of the law within the meaning of the Volstead Act, which imposes the duty of making searches and seizures on "any officer of the law." *Gambino v. United States,* 275 U. S., 310: 72 Law Ed. 293. Mr. Justice Grandeis said in that case:

> "The government contends that the evidence was admissible, because there was probable cause, *Carroll v. United States,* 267 U. S., 132, 153, 69 Law Ed. 543, 551, 39 A. L. R. 790, 45 Sup. Ct. Rep. 280, and also because it was not shown that the state troopers were, at the time of the arrest, search, and seizure agents of the United States. The defendants contend that there was not probable cause and that the state troopers are to be deemed agents of the United States, because Sec. 26 of Title II, of the National Prohibition Act imposes the duty of arrest and seizure where liquor is being illegally transported,

> not only upon the Commissioner of Internal Revenue, his assistants and inspectors, but also upon 'any officer of the law.' We are of opinion on the facts, which it it necessary to detail, that there was not probable cause. We are also of opinion that the term 'any officer of the law' used in Sec. 26 refers only to Federal officers, and that the troopers were not, at the time of arrest and seizure, agents of the United States. Compare *Dodge v. United States,* 272 U. S. 530, 531, 71 L. Ed. 392, 393, 47 Sup. Ct. Rep. 191."

See *Pettibone v. United States,* 148 U. S. 197. That case was one of conspiracy to obstruct and impede the administration of justice in the courts of the United States. This conspiracy was attempted to be shown by the acts which were a crime under the laws of the State of Idaho, and it was attempted to sustain those acts as proof of the conspiracy charged on the ground that the general evil intent might be found in the purpose to commit crime, and that that was sufficient to make the conspiracy one against the United States, because the doing of the acts therein was also an actual obstruction of justice in the courts of the United States. In the opinion of Chief Justice Fuller it was said:

> "While offences exclusively against the States are exclusively cognizable in the state courts, and offences exclusively against the United States are exclusively cognizable in the Federal courts, it is also settled that the same act or series of acts may constitute an offence equally against the

> United States and the State, subjecting the guilty party to punishment under the laws of each government. *Cross v. North Carolina,* 132 U. S. 131, 139. But here we have two offences, in the character of which there is no identity; and to convict defendants of a conspiracy to obstruct and impede the due administration of justice in a United States court, because they were guilty of a conspiracy to commit an act unlawful as against the State, the evil intent presumed to exist in the latter case must be imputed to them, although ignorance in fact of the pendency of the proceedings would have otherwise constituted a defence, and the intent related to a crime against the State."

The decision is important to be borne in mind in this case. Under its doctrine, a conspiracy to violate a law of the state does not become a conspiracy to violate the law of the United States, because in the course of the conspiracy a law of the United States was necessarily violated.

It is apparent from these decisions, we submit, that before the adoption of the 18th Amendment, it was no part of the duty of the sheriff or other state officer to do anything whatever to stop violations of the laws of the United States. There is nothing in the 18th Amendment which changes the respective rights and obligations of the state and the nation, unless it be found in the second clause of that amendment, which declares: "The congress and the several

states shall have concurrent power to enforce this article by appropriate legislation." What was meant by "concurrent power to enforce by appropriate legislation" has never been authoritatively declared by the Supreme Court.

In *Rhode Island v. Palmer,* 253 U. S., 350; 64 Legal Ed. 946, the majority contented itself with stating the conclusions reached and did not attempt to render a reasoned decision. With respect to the clause in question, the court says:

> "The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.
>
> "The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

The concensus of opinion has been, we believe, that the court intended to declare that both the nation and the state might legislate in aid of prohibition by the adoption of laws of their own, and invest in

their own officers the duty of enforcing their own laws. That has been the practice of the states, and whether that power is retained to them by virtue of their sovereignty or is granted to them by the Amendment, it is not necessary to inquire. No concurrent legislation in the ordinary sense has ever been attempted, and the Supreme Court has said that such concurrent legislation was not contemplated. No doubt the states, by virtue of the clause in question, could require by legislation that the officers of the state concur in enforcing the Volstead Act, but the State of Idaho has never undertaken to pass any such laws. Its laws on the subject of prohibition are found in *Idaho Compiled Statutes,* Section 2601, et seq. vol. I. These statutes were all passed prior to the 18th Amendment, and by virtue of the inherent sovereignty of the state.

We have seen that the state officers are not officers within the meaning of the Volstead Act, and we suggest further that that act nowhere devolves duties upon officers of the several states. Moreover, it could not do so, under the interpretation of concurrent legislation given by the Supreme Court, and under the case of *United States v. Jones,* 109 U. S., 513, where Mr. Justice Field uses this language with respect to the

use by the Federal government of state officers and state tribunals:

> "The use of the courts of the States in applying the rules of naturalization prescribed by Congress, the exercise at one time by State justices of the peace of the power of committing magistrates for violations of federal law, and the use of State penitentiaries for the confinement of convicts under such laws, are instances of the employment of State tribunals and State institutions in the execution of powers of the general government. At different times various duties have been imposed by acts of Congress on State tribunals; they have been invested with jurisdiction in civil suits and other complaints and prosecutions for fines, penalties, and forfeitures arising under laws of the United States. 1 Kent, 400. And though the jurisdiction thus conferred could not be enforced against the consent of the States, yet, when its exercise was not incompatible with States duties, and the States made no objection to it, the decisions rendered by the State tribunals were upheld. Whatever question might arise as to such delegation of authority, we can see none where the inquiry relates to an incidental fact, not involving in its ascertainment the exercise of any soverign attribute."

It appears in *Allen v. United States,* 4th Fed. 2nd, 688, that in the trial of that case in the lower court, the quiescence or neglect of state officials, and even of state officials performing official duties, was received in evidence and considered against the state officials as evidence of guilt of conspiracy to violate the pro-

hibition law. That case, we have no hesitancy in saying, ought not to be considered as an authority in any court. It brushed aside fundamental rights on the barest quibbles, and found inadmissible excuses for errors below of the most damaging character to the accused, even going to the extent of holding that declarations of a woman running a fancy house, made casually to a frequenter of her house, were properly received in evidence, because, although the name of that woman was not known, and it was not in evidence that she had ever dispensed intoxicating liquors in her house, and although she was not named in the indictment as one of the conspirators, the court held that she had dispensed liquors in her house, and was, therefore, a party to the conspiracy. No question was made in that case, such as we make here, and the fact that such evidence was received by the court without objection against state officials, strips the case of any value as an authority for the purpose here argued.

The charge in question also stated to the jury that if such peace officers in fact knew of such flagrant, open and continuous violations, that that was a circumstance which they had a right to take into consideration, together with all the other facts and circumstances discussed by the evidence in the case,

as shedding light on whether or not such peace officers, or any of them, actually joined the conspiracy charged. This portion of the charge was misleading, because there were no other circumstances in the case having reference to the peace officers except such as were offered for the purpose of showing their complicity in the conspiracy.

The charge further informed the jury that if the acquiescence in the law violation was due to mere negligence, inefficiency, incompetency or inability to perform the public duties devolving upon such officer or officers, then there was no criminality on their part, but that if the conduct of the officers was passive and intentional, with full knowledge of a conspiracy to bring about such violation and was passed with a view and for the purpose of protecting and aiding the conspiracy, then that might be accepted as evidence of their complicity in the conspiracy.

Quoting from the charge the following words:

> "In other words, was the inaction or acquiescence, if any, due to a mere failure of duty, or was it a passive refraining from performing the duty with the knowledge of the violations, for the purpose of aiding and assisting in the conspiracy to violate the laws which were being violated?"

We submit that mere passive conduct of state of-

ficers, with knowledge of a violation of the laws of the United States, having no duty in the premises, cannot make them guilty of aiding and abetting in the violation of such laws.

Mr. Bishop, whose work on criminal law is a classic, thus states the doctrine:

> "A mere presence or presence combined with refusal to interfere or with concealing the fact, or the mere knowledge that a crime is about to be committed, or a mental approbation of what is done, while the will contributes nothing to the doing, will not create guilt. As a matter of evidence such facts have a greater or less weight, according to the circumstances, but in law there must be something a little further, as some word or act; or, in the language of Cockburn, C. J., spoken indeed to a case where there was no presence, one to be a party in another's crime must incite or procur or encourage the act."
> *Bishop's Criminal Law*, vol. 1, sec. 633.

See also the cases cited to the text.

This is good law, both on reason and authority. It is difficult to see on reason how it is possible for one, having no duty in the premises, to be guilty of joining in a conspiracy by simply doing nothing.

Assignment of Error No. 150½.

This specification relates to the following instruction given by the court as a part of its general charge:

> "I further instruct you that persons conspire to commit an offense against the United States when they conspire to do an act or concerts of acts which can be carried into effect only by violating the criminal laws of the United States. When parties conspire to commit acts and things which necessarily and inevitably must constitute a violation of the criminal laws of the United States, then such parties conspire to commit an offense against the United States; and a party conspires to commit an offense against the United States when he conspires to bring about the commission of such offense by another or others."

This part of the general charge was excepted to necessarily in a hasty and general manner, but sufficiently to identify the part of the charge intended to be excepted to. See exception taken, page 792, Transcript. By some oversight, it was omitted from the Specifications of Error. We have filed a motion in this court to amend the Specifications of Error, so as to include that portion of the charge referred to as No. 150½, and, on the assumption that that motion will be granted, we proceed to argue the specification.

The instruction in effect tells the jury that parties conspire to commit an offense against the United States when they conspire to do nothing more than to violate the laws of the state.

> "When parties conspire to commit acts and things which necessarily and inevitably must con-

> stitute a violation of the criminal laws of the United States, then parties conspire to commit an offense against the United States, and a party conspires to commit an offense against the United States when he conspires to bring about the commission of such offense by another or others:"

The charge means, if it means anything, that a conspiracy to violate the laws of the State of Idaho prohibiting sales of intoxicating liquors by giving immunity for such violations under the law of Idaho, was necessarily a conspiracy to violate the laws of the United States. That clearly is not the law.

In the *License Tax Case,* 5th Wallace, 462, the government was prosecuting for sales of intoxicating liquors without a license in states in which the sale of intoxicating liquors was forbidden. It was argued for defendants in error in those cases that the license to carry on a particular business gives authority to carry it on; that the dealings in controversy were parcel of the internal trade of the state in which the defendants resided; that the internal trade of the state is not subject in any respect to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade granted under acts of congress must, therefore, be absolutely null and void, and consequently that

penalties for carrying on such trade without such licenses could not be constitutionally imposed.

The court thought it might be difficult to sustain the license laws if the licenses gave authority to conduct the business licensed in states which forbade the sales of liquor, but did not consider that the federal licenses gave any such authority, saying:

> "If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.
>
> "But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. *They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid.* The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it."

Under the doctrine of this case, it is impossible to found a conspiracy on the conduct of the officials of the village of Mullan in the course of conduct pursued by them with respect to sales of intoxicating liquor within the precincts of the village, and the case

clearly shows the inaccuracy of the court below in stating the law as it did in the portion of the charge here involved.

If the licenses issued by the government of the United States to sell liquor in states where the sales of liquor were forbidden "simply expressed the purpose of the government not to interfere by penal proceedings with the trade nominally licensed," then the converse must be true that the action of the authorities of the village of Mullan in licensing sales of liquor therein must also simply express the purpose of the village not to interfere by penal proceedings with the trade nominally licensed, and if the United States might do that without violating the prohibition law of the state, then clearly the state or any of its instrumentalities may do the same thing without violating the prohibition law of the United States.

The evidence in the case must be considered in connection with this instruction, and the utmost that can be found or implied from the evidence was that the officers of the village of Mullan would not enforce against sellers of liquor within the village the laws of the State of Idaho. In fact, if instead of camouflaging their purpose by issuing licenses for innocent businesses, they had actually issued licenses to sell liquor and no more, they could not, under the doctrine

of the license cases, be guilty of any offense against the laws of the United States.

When it is considered that there are two sovereignties in every state, each distinct and separate from the other, it is a clear misconception to think that a conspiracy simply to violate the laws of the state can also be considered a conspiracy to violate the laws of the United States. The conspiracy consists in a meeting of the minds to violate the laws of the United States. It cannot be proven by a meeting of the minds to violate the laws of the state. In this connection we again insist that there is no evidence whatever in the case to show that the officials of the village of Mullan intended to do anything with respect to sales of liquor, except to refrain from enforcing the state laws by its own police. The officials of the village were as guiltless of any offense against the United States by that course of conduct, as the United States was guiltless of any offense against the states by issuing licenses to sell liquor in such states which, as the court in the license cases say: "simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed."

It is not our contention that the administrative officers of the state may not conspire to violate the Volstead Act by giving active and affirmative pro-

tection to persons engaged in selling liquor. We take no exception to federal cases in which such conspiracies have been prosecuted and punished. Our contention here is that this conspiracy depends upon the proof against the council of the village of Mullan, which was one of the instrumentalities of the State of Idaho, and that nothing in the evidence shows, on the part of the village or any of its officials, more than quiescence in permitting the sales of liquor within the village. And if such conduct constituted no conspiracy against the laws of the United States, then the defendants in error, Weniger and Bloom, could not be guilty in aiding that abortive conspiracy.

Assignment of Error No. 153:

This specification is directed to the failure of the court to give the following instruction asked for by the defendants:

> "The indictment alleges that Weniger and Bloom were members of the conspiracy charged. It is in proof that said persons are officers of the State of Idaho, to-wit, the sheriff of Shoshone County, Idaho, and his deputies. If they actually entered into a conspiracy to maintain the nuisances charged, or to keep, possess, sell, transport or manufacture intoxicating liquors, then their official character does not render them immune from punishment for that offense. But the court charges you that their official character

as state officers does not make them guilty, however remiss they may have been, if they were remiss, in failing to enforce the laws of the State of Idaho against the commission of nuisance or other infractions of the state law. It is no part of their duty as officers of the state, under the laws of the United States, to make arrests without a proper warrant under the laws of the United States, for infractions of the prohibition law, or to otherwise endeavor to enforce such laws, and their mere failure to make such arrests, or to otherwise endeavor to enforce such laws, if that be the only evidence to connect them with the conspiracy charged, would not make them guilty under the indictment in this case, and they should be acquitted."

This instruction is the converse of that given by the court, states the law as we conceive it to be, and it was a necessary instruction in view of the course of conduct pursued by the government in presenting its testimony.

Assignment of Error No. 155 reslates to another instruction asked by the defendants, and refused, and was as follows:

"The court charges you that the mere presence of an accused at a place or places where overt acts were being committed in aid of the conspiracy, coupled with a refusal to interfere, or mere concealment of the crime, or a mere knowledge that the crime was being committed, or a mental approbation of what was being done while the will contributed nothing in the doing, would not

> be sufficient, without more, to justify you in finding that a particular defendant was a party to the conspiracy. Such acts on the part of a defendant would be circumstances to be considered in determining whether any particular defendant was a party to the conspiracy, but standing alone, they would not be sufficient evidence of guilt to justify a conviction."

The law therein stated we believe to have been correctly stated. *Bishop's Criminal Law,* Vol. 1, Sec. 633 and cases cited.

The Court gave nothing on the subject in its general charge, and ought to have given the special instruction asked.

Assignment of Error No. 156:

This specification relates to the refusal of the court to give the special instruction asked by the defendants as follows:

> "In connection with the testimony as to the activity or inactivity of Sheriff Weniger and his deputy, Bloom, as bearing on their guilt or innocence as conspirators, the court charges you that since March 26, 1927, it has been law of the State of Idaho that said officers have no authority to make searches in homes or other places in which intoxicating liquors might have been kept for sale without a search warrant issued on sworn evidence of a positive character. A search warrant issued on information and belief, or based on conclusions rather than facts, gives no authority

for such a search. The court charges you further, as bearing on the activity or inactivity of said defendants that it is your duty to consider under the evidence whether the sheriff was furnished by the County Commissioners of Shoshone County with a sufficient force of deputies or with a fund to make possible on his part activity greater than the evidence shows to have been exerted by him in enforcing the prohibition laws of the state."

The government had been pursuing the defendants for their failure to enforce the laws of the State of Idaho with respect to liquor violations. The defendant, Weniger, undertook to meet that line of attack by showing the handicaps under which he had been operating. He had a right to do that. Among the other handicaps was the case of *State v. Arreguie* (Idaho), 254 Pac. 788, in which case it had been held that state officers have no right to make searches and seizures without a search warrant issued on sworn evidence of a positive character, and that a search warrant issued on information and belief, or upon mere conclusion, and not facts, was null and void. The defendant, Weniger, had been prevented from referring to that case and its effects on his actions by an adverse ruling of the court as follows:

"MR. NUZUM: Q. Was there any ruling of the Supreme Court that handicapped you in 1927?"

A. There was.

MR. RAY: Just a moment, your honor please. We object to both the form of the question and—
THE COURT: "The objection is sustained." (Trans. p. 688.)

Certainly the testimony sought to be elicited by the question was competent, and it was relevant in view of the purpose for which it was asked.

The effect of the absence of the testimony made the special instruction asked more necessary. We can conceive of no reason which would justify the refusal to grant the instruction.

Assignments of Error No. 157 and 158:

These specifications complement each other, and relate to the failure of the court to give the special instructions asked, as follows:

"The court charges you that the fact that many persons in a community or in a neighborhood are engaged in violating the law is not evidence of a conspiracy on their part to violate the law. There must have been a meeting of the minds of such persons in an agreement to so violate the law in which each person was to do something more than to himself violate the law. Any number of separate violations of the law, without such an agreement, does not constitute a conspiracy."

"The court charges you that in order to constitute a conspiracy to violate the federal prohibition laws, there must have been 'a serious

> and substantially continued group scheme for co-operative breaking of such laws.' Such conspiracies are most difficult to try without prejudice to innocent defendants, and testimony should be carefully scanned by the jury in alleged conspiracy cases to determine whether the acts proved show simply individual action without concert, or whether it shows 'a serious and substantially continued group scheme for co-operative law breaking."

The court did not at all instruct the jury on this most important question. The chief justice and presiding justices of the several circuits, at the judicial conference held in 1925 under the Act of September 14, 1922, recommended to the judges of the several districts that they should be particular in these wholesale prosecutions for conspiracy, to see that the testimony showed "a serious and substantially continued group scheme for co-operative breaking of such laws, and said that they made that recommendation because they observed that "so many conspiracy prosecutions do not have this substantial base." And further that "the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." This recommendation is found stated in *United States v. Eissenbunger et al,* 16 Fed. (2nd) 816.

It will be seen that the special instruction No. 158 copies the recommendation of the judicial council ver-

batim. We can see no reason why the instruction should not have been given. It would not have been misleading to the jury, and so far as the instruction related to the possibility of prejudice to defendants arising from the nature of conspiracy prosecutions, it was the exact language of the judicial council, and it seems to us perfectly proper that the caution should be given to the jury inasmuch as the judicial council had stated as a fact that it was likely to lead to the perpetration of injustice. But, if we are in error about that, then we submit that Specification of Error No. 157 states the rule in a perfectly unobjectionable manner, and one within the apprehension of jurors, and that that instruction, at least, ought to have been given by the court.

Assignment of Error No. 165:

This specification relates to the special instruction asked as follows:

> "The accused are competent witnesses for themselves in this case under the laws of the United States. Their credibility may be affected by their interest in securing an acquittal, but aside from that fact, they stand on the same footing as any other witness in this case in the matter of credibility. Their manner and demeanor in testifying, their apparent prejudice, or bias, their fairness and consistency in testifying, and their interest in testifying, are all factors proper to be con-

sidered in weighing the credibility of their testimony, to the same extent as the same factors are to be considered in weighing the testimony of any other witness. And after weighing the testimony of the accused in the manner stated you believe him to be more credible, better entitled to be believed than the witness or witnesses for the prosecution, then if the conflict in the testimony be as to a material matter in the case, you are entitled to believe the accused in preference to the prosecuting witnesses, and may find your verdict on such belief."

We submit that it was error to refuse the instruction. The only testimony against either of the defendants was as to alleged conversations had by them with certain witnesses who were thoroughly discredited—convicted and confirmed bootleggers, who had been tolled into the service of the government as undercover men by pecuniary rewards, drunkards, gamblers and whoremasters, and all round bums, and these witnesses were overwhelmingly impeached as unworthy of belief. Weniger and Bloom, on the other hand, were men of character and standing, as testified to by a large number of the best men in the County of Shoshone, Idaho.

It was proper to bring the contrast between the defendants and their accusers to the test by the direct instruction asked. The general charge of the court did in a manner state the law on the subject, but

without making it specific as to the only defendants to whom it could have application, and stating the law in very general terms.

The court will see the importance of the matter when it recurs to the testimony in connection with the motion to dismiss as to the defendants for want of testimony to connect them with the alleged conspiracy.

Respectfully submitted,

TURNER, NUZUM & NUZUM,
George Turner,
N. E. Nuzum,
R. W. Nuzum,

O. J. BANDELIN,

Counsel for Appellants,